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NO. ____

In The
Supreme Court Of The United States

TIEN FU HSU, et al.,

Petitioners,

vs.

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of the State of Nevada

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Clark County, Nevada, as owner and operator of the commercial jet airport serving Las Vegas, enacted laws that require property owners adjacent to its airport to set aside large amounts of valuable airspace (the kind of property used by others in the vicinity for the construction of major high rise hotels) to permit the occasional physical use of the airspace by pilots who need a bit more maneuvering room on approach or departure than the airport operator purchased to provide for that purpose.

The question presented is:

When government action requires owners of private property adjoining an airport *to allow aircraft to enter their airspace* on an *ad hoc* basis so that the airspace must be set aside for public use, rather than private development, has the government physically taken property requiring just compensation under the 5th Amendment?

PARTIES TO THE PROCEEDING

The Petitioners are: Tien Fu Hsu, Lisa Su Family Trust, Lisa Su Trustee, Peter B. Liao, West Park, Inc., Lucky Land Company, Lucky Land Company Investments, Lucky Land Company Enterprises Limited Partnership, and West Park Company 1.

No corporate Petitioner has a parent corporation, and no publicly held company owns stock in any Petitioner.

The Respondent is the County of Clark, a political subdivision of the State of Nevada.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

TABLE OF CONTENTS
(continued)

Page

I THERE IS WIDESPREAD, DIRECT CONFLICT AMONG THE STATE COURTS ON WHETHER GOVERNMENT ACTION THAT PUTS PRIVATELY OWNED, BUILDABLE AIRSPACE NEAR AIRPORTS TO PUBLIC USE IS A PHYSICAL TAKING THAT REQUIRES COMPENSATION UNDER THE U.S. CONSTITUTION'S 5TH AMENDMENT 8

A. States That Require Compensation 9

B. States That Deny Compensation 11

TABLE OF CONTENTS
(continued)

Page

II THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GOVERNMENT ACTION REQUIRING PROPERTY OWNERS TO SUBMIT TO PUBLIC TRESPASS IS A *PER SE* PHYSICAL TAKING THAT REQUIRES COMPENSATION 13

A. Regulatory Taking Cases Involve Government Action That Merely Restricts The Use Property Owners May Make Of Their Own Land 14

B. When Government Action Compels Private Property Owners To Allow Their Property To Be Used By The Public, That Is A Physical Taking Requiring Compensation 15

TABLE OF CONTENTS
(continued)

Page

C. This Court Has Carefully Separated Physical And Regulatory Takings. The Decision Below Makes Hash Of The Court's Design 20

III THIS COURT'S MOST RECENT CASE INVOLVING AIRPORT OPERATOR RESPONSIBILITY IS MORE THAN 40 YEARS OLD. EXPANSION OF PRECEPTS LAID DOWN AT THE DAWN OF THE JET AGE IS NEEDED 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Ackerman v. Port of Seattle,
348 P.2d 664 (Wash. 1960) 9

Agins v. City of Tiburon,
447 U.S. 255 (1980) 14

Branning v. United States,
654 F.2d 88 (Ct. Cl. 1981) 22

Brown v. United States,
73 F.3d 1100 (Fed. Cir. 1996) 19, 22

Cheyenne Airport Bd. v. Rogers,
707 P.2d 717 (Wyo. 1985) 11

City of Burbank v. Lockheed Air Terminal, Inc.,
411 U.S. 624 (1973) 21

City of Oakland v. Nutter,
92 Cal.Rptr. 347 (Cal.App. 1970) 19

Davis v. Newton Coal Co.,
267 U.S. 292 (1925) 16

Dolan v. City of Tigard,
512 U.S. 374 (1994) 18

F.P.C. v. Florida Power Corp.,
480 U.S. 245 (1987) 18

Fitzgerrald v. City of Iowa City,
492 N.W.2d 659 (Iowa 1992) 11

Griggs v. Allegheny County,
369 U.S. 84 (1962) ..... passim

Hageman v. Board of Trustees,
251 N.E.2d 507 (Ohio App. 1969) 9

TABLE OF AUTHORITIES
(continued)

Page

Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth.,
111 So. 2d 439 (Fla. 1959) 11

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 16, 17

Hughes v. Washington,
389 U.S. 290 (1967) 16

Indiana Toll Road Comm. v. Jankovich,
193 N.E.2d 237 (Ind. 1963) 9

Jackson Municipal Airport Auth. v. Evans,
191 So. 2d 126 (Miss. 1966) 9

Kaiser-Aetna v. United States,
444 U.S. 164 (1979) 17

Kentucky Airport Zoning Comm. v. Kentucky Power Co.,
651 S.W.2d 121 (Ky. App. 1983) 9

Kimberlin v. City of Topeka,
710 P.2d 682 (Kan. 1985) 11

La Salle National Bank v. County of Cook,
340 N.E.2d 79 (Ill. App. 1975) 11

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 17, 18

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992). 15, 17

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 14

McShane v. City of Faribault,
292 N.W.2d 253 (Minn. 1980) 9

TABLE OF AUTHORITIES
(continued)

Page

Nollan v. California Coastal Comm.,
483 U.S. 825 (1987)..... 17

Palazzolo v. Rhode Island,
533 U.S. 606 (2001)..... 14

Peacock v. County of Sacramento,
77 Cal. Rptr. 391 (Cal.App. 1969)..... 9

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978)..... 14, 15

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922)..... 16

Roark v. City of Caldwell, 394 P.2d 641
(Idaho 1964)..... 9

San Diego Gas & Elec. Co. v. City of San Diego,
450 U.S. 621 (1981)..... 14

Sneed v. County of Riverside,
32 Cal. Rptr. 318 (Cal. App. 1963)..... 5, 9, 12

Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency,
535 U.S. 302 (2002)..... 14

Tara Engineering Corp. v. City of Newark,
40 A.2d 559 (N.J. 1945)..... 9

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977)..... 9, 10, 11

United States v. 48.10 Acres of Land,
144 F. Supp. 258 (S.D.N.Y. 1956)..... 9

United States v. Causby,
321 U.S. 256 (1946)..... passim

TABLE OF AUTHORITIES
(continued)

Page

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 10

United States v. Winstar Corp., 518 U.S. 839 (1996) 10

Williamson County Reg. Plan. Commn. v. Hamilton Bank, 473 U.S. 172 (1985) 14

Yee v. City of Escondido, 503 U.S. 519 (1992) 18

STATUTES

42 U.S.C. § 4601 *et seq* 19

42 U.S.C. § 4651(8) 19

42 U.S.C. § 4655 19

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution..... 2, 8, 17, 22

Fourteenth Amendment, United States Constitution, §1 2

TEXTS

Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?* 55 Land Use Law & Zoning Digest, no. 9, at p. 4 (Sept. 2003) 4

PETITION FOR WRIT OF CERTIORARI

Petitioners Tien Fu Hsu, *et al.* respectfully pray that a Writ of Certiorari issue to review a final judgment of the Supreme Court of the State of Nevada.

OPINIONS BELOW

The decision below was filed on September 30, 2004. (App., p. 1.) A timely Petition for Rehearing was denied in an order filed December 23, 2004. (App., p. 65.) The trial court's opinion finding liability is at App., p. 52. None of these is published.

JURISDICTION

This case involves action by Clark County in direct aid of its own economic interest as proprietor of McCarran International Airport, serving Las Vegas, Nevada. As owner/operator of the airport, Clark County assumed responsibilities that can neither be shunted off to the federal government (as overall regulator of airborne commerce) nor imposed on neighboring property owners. (*Griggs v. Allegheny County*, 369 U.S. 84, 89-90 [1962] [airport operator is Constitutionally responsible for acquiring all property interests necessary for airport to function properly].)

The County adopted regulations requiring the Petitioners to allow random aircraft overflights of their property by jet aircraft using the County's adjacent airport. Absent compensation, that was a naked attempt to have unrelated neighbors shoulder part of the

financial burden of operating this public airport. The trial judge held that requiring them to submit to such random and recurring physical invasions was a *per se* taking of property and a jury awarded compensation.

On appeal, the Nevada Supreme Court reversed. It theorized that — in spite of the regulation's de facto authorization of physical aircraft entry into the Petitioners' airspace — any taking was regulatory, not physical, and was thus subject to more lenient judicial review. (App., p. 1.) Following denial of their timely rehearing petition on December 23, 2004 (App., p. 65), the Petitioners seek this Court's review.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use without just compensation."

Fourteenth Amendment, United States Constitution, §1:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

State courts are in conflict and disarray over interpretation of the 5th Amendment as it relates to the precise issue presented by this case, i.e., when an airport operator requires owners of land adjoining its airport to leave their own airspace unused for private purposes in order to allow commercial airline pilots to

use that airspace if, as, and when desired, can the airport operator simply commandeer that property interest, or does the 5th Amendment (as applied to the States through the 14th Amendment) require compensation for that taking of property for physical use by the public?

The opinion below explicitly recognizes that the State courts are divided on this issue, as it cites decisions going each way and then aligns Nevada with one group — relegating the conflicting State courts to a "but see" listing in a footnote. (See App., p. 36, n. 88.)

The facts at bench are simple. The Petitioners ("landowners") own some 37 acres of land off the side of Runway 19R/1L at McCarran International Airport in Las Vegas, Nevada. Their land is not in either the approach or departure path for aircraft using the airport, but has been placed by Clark County, the airport's owner/operator, in what the County calls a "transition" zone, an area adjacent to the runway for pilots to use when they are unable to confine the flight of their aircraft within the approach/departure zone acquired by Clark County for the airport and stray off to the side. The trial court summarized the evidence thus:

> "The undisputed testimony of the Airport personnel is that the reason for the height limitations on this property is due to the property's inclusion in a transition zone. The transition zones are zones that are needed by the airport to safely operate and which *can be used by airplanes* when other methods of approach

> and departure are blocked or unusable for whatever reason. *While the airport personnel cannot say how often this space is invaded, they are clear that the space is necessary and that it is used.*" (App., p. 53; emphasis added.)[1]

As shown in an article written after the trial below by a well-known academic who was engaged by the County as a consultant in this case, this area was "set aside for possible use by incoming and outgoing aircraft." (Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?* 55 Land Use Law & Zoning Digest, no. 9, at p. 4 [Sept. 2003].) Just so.

> "The purpose of the Transition Zone is *to allow aircraft the temporary use of airspace above privately owned property.* The County adopted the ordinances to prevent building into the Transition Zone because *aircraft could need to use that airspace at unpredictable times.*" (Laitos, *op. cit.*, p. 4; emphasis added.)

As such, the ordinance de facto converts Petitioners' airspace into the functional equivalent of a

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[1] The County even urged the Nevada Supreme Court to hold that it had acquired a prescriptive easement to have aircraft fly over this property (AOB 29), an interest that could *only* be acquired by actual, continuous, and long-term physical invasion of the landowners' property — a concession, in other words, that a physical taking had indeed occurred.

"runaway truck ramp" on a highway, that is, an area where an out of control vehicle can get safely out of the normal traffic lanes. The fact that it may not be regularly used makes it no less a part of the public highway and no less the responsibility of the agency that owns and maintains the highway.

To maintain the "transition" zone for aircraft flight whenever pilots (in their sole discretion) feel appropriate, the County has prohibited the landowners from making any use of a large volume of airspace within their ownership that slopes upward from 35 feet nearest the runway to 200 feet further away (Ord. 1221; App., p. 4, 6), constituting some 60% of their otherwise useable airspace. (App., p. 12.)[2] That privately owned airspace is earmarked for physical use by aircraft in flight, as the County's aviation expert testified.

As the trial court found: "the governmental action . . . denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants." (App., p. 63.)

This 37-acre parcel was brought closer to the airport when the County decided to expand its

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2 These factual aspects of the case thus bear a striking similarity to *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (Cal.App. 1963) (discussed *post*, pp. 9-10, 12) where, in the guise of just such wedge-shaped height limitations, the county de facto took an avigation easement to facilitate operations at its own airport.

commercial jet operations by enlarging and converting a general aviation runway (one used by small private planes) into another major arrival and departure point for the largest jets serving Las Vegas. Having small private aircraft as neighbors is one thing; replacing them with large commercial jetliners is something else. It was the extra maneuvering room needed by the latter that prompted the County to expand its "transition" zone to include a large chunk of the landowners' property and force its dedication to public use.

The landowners' property is otherwise in what would be considered a "high rent" district, being near the famous Las Vegas Strip,[3] and in close proximity to the Luxor, Mandalay Bay, Monte Carlo, Bellagio, Alladdin, and Balley's casino/resorts. As the Strip development moved closer to this property, it became progressively more valuable.

Thus, the landowners' expert appraisal witness testified that the highest and best use of the property (absent the County's taking of the airspace) was to develop it in the same manner as its neighbors, as a major casino/resort, with a 400-foot hotel tower. Nearby casino/resort operators confirmed that opinion.

With the regulation in place — and the recurring aircraft overflight a reality — the use of the property

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[3] The Las Vegas Strip is just westerly of the subject property, and its casino/resort hotels are both north and south of that point, quite near the airport.

shrank to uses like warehouse, cemetery, or golf course; in other words, nothing approaching its potential before the County took the use of the airspace, illustrating precisely the sort of devastating impact of an avigation easement on underlying land, visualized by this Court in *United States v. Causby*, 328 U.S. 256, 262 (1946).

The County's expert appraisal witness concurred that, before the County placed the property into the airport's "transition" area, the landowners had the right to make the same kind of development as anyone else with property on or near the Las Vegas Strip.[4]

The trial judge held that the County's actions resulted in a physical taking of the landowners' property and set the matter for a valuation trial. (App., p. 63.)

The impact of the County's conversion of the airspace rights in this property to public use was dramatic. The County's own appraiser testified that the landowners were damaged to the tune of $5,320,000. The landowners' appraiser thought it was considerably more, and so did the jury, which awarded $13,000,000 for the taking. With interest and litigation costs, the judgment came to $22,107,674.13. (App., pp. 19-20.)

The Nevada Supreme Court reversed, holding if there was a taking, it was regulatory, not physical. To

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[4] An inkling of the property's value was shown when the County stipulated before trial to pay the landowners $758,000 for a narrow slice of it to widen Tropicana Boulevard.

proceed on a regulatory taking theory, the landowners were told to pursue development applications to the County — a process certain to consume years — and then sue if those were denied. (App., p. 2.) In the meantime, their property would be physically used by the airport, and the County would thereafter claim prescriptive rights to continue that use, as it did (unsuccessfully to this point) in the courts below.

The Nevada Supreme Court misunderstood the nature of the taking involved here and compounded the State court conflict on this basic issue of 5th Amendment takings law. Thus, this petition.

REASONS FOR GRANTING THE WRIT

I

THERE IS WIDESPREAD, DIRECT CONFLICT AMONG THE STATE COURTS ON WHETHER GOVERNMENT ACTION THAT PUTS PRIVATELY OWNED, BUILDABLE AIRSPACE NEAR AIRPORTS TO PUBLIC USE IS A PHYSICAL TAKING THAT REQUIRES COMPENSATION UNDER THE U.S. CONSTITUTION'S 5TH AMENDMENT

The fifteen State courts that have analyzed this question have reached conflicting results. Nine States have held that such government action results in a physical taking of property that constitutionally requires compensation. Six States (including the one below) refuse to require compensation. The application of this

basic element of the federal constitution should not depend on the situs of the affected property.

A

States That Require Compensation

Nine State courts have held that airport operators must compensate adjacent landowners for the physical taking accomplished by building height regulations that permit flight through their airspace at low levels: Indiana, Mississippi, Idaho, Ohio, California, New Jersey, Minnesota, Washington, and Kentucky.[5]

In these cases, a municipal airport operator had imposed height restrictions curtailing building on

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[5] *Indiana Toll Road Comm. v. Jankovich*, 193 N.E.2d 237 (Ind. 1963); *Jackson Municipal Airport Auth. v. Evans*, 191 So. 2d 126 (Miss. 1966); *Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964); *Hageman v. Board of Trustees*, 251 N.E.2d 507 (Ohio App. 1969); *Peacock v. County of Sacramento*, 77 Cal. Rptr. 391 (Cal.App. 1969); *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (Cal.App. 1963); *Tara Engineering Corp. v. City of Newark*, 40 A.2d 559 (N.J. 1945); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960); *Kentucky Airport Zoning Comm. v. Kentucky Power Co.*, 651 S.W.2d 121 (Ky. App. 1983); see also *United States v. 48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y. 1956).

property adjacent to its airport. When the property owners sued, each of these courts held that the severe restriction on building heights was a taking that constitutionally required compensation. These courts noted that the restrictions were intended to permit actual physical use of the privately owned airspace by aircraft (whether few or many was not relevant) and that such interests could — and should — have been directly acquired for public use by eminent domain.

Additionally, some opinions noted that the action was taken in the municipality's entrepreneurial capacity as a self-interested airport operator (responsible, under *Griggs*, 369 U.S. at 89-90, for acquiring airspace needed for safe operations), rather than as a disinterested referee of land use disputes among other landowners, as is the case with land use regulations generally. These cases are thus in harmony with this Court's decisions viewing warily regulatory action in which the regulator has a financial interest. (*United States v. Winstar Corp.*, 518 U.S. 839, 896 [1996] ["statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"]; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 [1993] [care taken because "the Government has a direct pecuniary interest in the outcome"]; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [caution exercised "because the State's self-interest is at stake"].)

In these State court cases, constitutional responsibility was placed on the municipality.

The Nevada Supreme Court acknowledged that these cases conflicted, attempted to distinguish those from California, Washington, Kentucky, and New Jersey (App., pp. 35-36), but could only note (without even trying to distinguish) the conflict it created with the decisions from Idaho, Indiana, Minnesota, and Mississippi (App., p. 36, n. 88).

B

States That Deny Compensation

Five states (aside from Nevada in the instant case) have held that airport operators may order adjacent landowners to dedicate their airspace for public use by aircraft without making any compensation whatever: Wyoming, Illinois, Iowa, Florida and Kansas.[6]

These courts viewed the regulations as routine police power exercises, for which compensation is not required. They seemed not to grasp that the regulators were in fact acquiring privately owned, privately usable property for physical use by members of the public, thus creating conflict not only with the other State

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[6] *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 (Wyo. 1985); *La Salle National Bank v. County of Cook*, 340 N.E.2d 79 (Ill. App. 1975); *Fitzgerrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992); *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959); *Kimberlin v. City of Topeka*, 710 P.2d 682 (Kan. 1985).

courts discussed earlier, but also with this Court's consistent efforts to distinguish between mere regulation that does not require compensation and action that either demands or permits the use of private property by third parties that does — as discussed in the next section.

The conflict is probably best explained by one of the California cases that required compensation:

> "We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and the zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone." (*Sneed v. County of Riverside*, 32 Cal. Rptr. 318, 320 [Cal. App. 1963].)

Airport height restrictions are different from land use regulations in general and other kinds of height restrictions in particular because they allow actual physical invasion by the public, and do not just regulate the private use of land. Constitutionally, they require different treatment, as do all other cases where government authorizes physical invasion of private property by members of the general public. (See cases discussed *post*, pp. 15-20.)

II

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GOVERNMENT ACTION REQUIRING PROPERTY OWNERS TO SUBMIT TO PUBLIC TRESPASS IS A *PER SE* PHYSICAL TAKING THAT REQUIRES COMPENSATION

The County's action plainly was designed to permit pilots to use the landowners' airspace at low levels as and when they choose. (App., p. 16.) The County's own expert aviation witness testified that the purpose of the "transition" zone into which the subject property had been placed was to allow "maneuvering" room so that pilots "on occasion" could use the landowners' airspace if they felt they needed to — not on a daily basis, or even a predictable basis, but whenever the pilots see fit. (App., p. 13.)

The Nevada Supreme Court said that was merely a regulatory matter, to be adjudged a taking — if at all — only under this Court's regulatory taking cases, not its physical taking cases.

The decision below wholly confuses the distinction between actual regulations that impact the extent of an owner's individual ability to use private land and actions that are "regulations" in form but, in fact, permit members of the general public to use private land as though it were publicly owned. The latter are *per se* physical takings.

A

Regulatory Taking Cases Involve Government Action That Merely Restricts The Use Property Owners May Make Of Their Own Land

The Court below misunderstood the difference between regulations and physical invasions.

Land use regulations do things like segregate inharmonious land uses, preserve historic structures, and plan for orderly development. Thus, in a typical regulatory taking case, a government agency enacts a regulation, or applies a condition, that either denies or restricts landowners' rights to use their own land. This can take the form of a down-zoning, a permit denial, a variance denial, a conditional permit grant, or the like. Examples can be found in cases like *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

Whether such action subjects the government to 5th Amendment liability depends on the severity of the impact, determined on an *ad hoc* case-by-case basis, as described in the seminal *Penn Central* decision. (For recent reaffirmations of the *Penn Central* analysis, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 [2001]; *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326-327 [2002].)

In such cases, the regulations are designed to limit the uses of land by their owners, but not to create new uses of private property by third parties. When the impact of even the best-intended regulation is so severe that it denies economically productive use of the affected land, then compensation is constitutionally mandated — either under the *ad hoc Penn Central* factual analysis or, if the impact is severe enough, under the categorical analysis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

But that is not this case. This case is ***not*** about a mere regulation of the use of the landowners' property, but a County action *permitting members of the public to fly through this privately-owned airspace at will.* That requires a different analysis.

B

When Government Action Compels Private Property Owners To Allow Their Property To Be Used By The Public, That Is A Physical Taking Requiring Compensation

The County's action does not merely regulate or restrict the landowners' use of their property. Instead, it grants the flying public the right to invade the landowners' airspace at low levels, thereby stultifying rational economic use of the property.

Such actual public use is a physical taking of property. As the County never acquired the right to use

that property itself, it cannot grant that right to third parties — unless it adopts "the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].) Anything less, as the Court put it in *Pennsylvania Coal*, 260 U.S. at 416, would be an effort to satisfy a municipal "desire by a shorter cut" than the constitutional framers decreed.

The Nevada Supreme Court appears to have fallen into a label affixation trap. Because the County *claimed* it was merely regulating, the court treated its action as regulatory. But this Court has always judged governmental actions by their effects, not merely by their words. "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].) Or, as more recently summarized, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring].)

What the Nevada Supreme Court did was to violate one of the most important rights a property owner has, the right to exclusive possession:

> "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to exclude strangers, or for that matter friends, but especially the Government." (*Hendler v. United States*, 952 F.2d 1364, 1374 [Fed. Cir. 1991].)

When government mandates permanent physical invasion, the 5th Amendment commands compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it . . . ." (*Lucas*, 505 U.S. at 1015.)[7]

— *Item*: In *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), the government sought to require the owner of a private marina to allow members of the public to use its waterways. The Court held that such a regulatory requirement would be a physical taking (because it allowed public trespass on otherwise private property) and could not be done without compensation.[8]

— *Item*: In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a New York statute required apartment building owners to permit cable TV companies to install minute quantities of cables and boxes for their customers. Such authorization of third party trespass, held the Court, required compensation.

— *Item*: In *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), the Court held that requiring

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[7] In this context, "permanent" physical invasion means that those authorized by the government may use property when and as they see fit for as long as they choose. (*Hendler*, 952 F.2d at 1377.)

[8] That was a taking even though the public would only be using the same navigational lanes that were being privately used. Here, by contrast, the public is able to use the airspace over *all* of the subject property.

property owners to allow members of the public to walk on their beach could not be done without compensation. This rule was amplified in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of a required bike path to be used by members of the public.

In each of these cases *government enacted regulations that enabled strangers — i.e., members of the general public — to trespass at will.* And it was that enablement, that the underlying property owners did not invite[9] and were powerless to prevent, that rendered the government liable for a taking. One of the keys — which fits this case like the proverbial glove — is that "the owner may have no control over the timing, extent, or nature of the invasion." (*Loretto*, 458 U.S. at 436.) As the County's aviation expert testified, such unplanned, uncontrolled, unknown use of the airspace was precisely the effect of the County's regulation. That was confirmed by the post-trial evaluation of the evidence and the issues by County consultant Professor Laitos, quoted *ante*, p. 4.

The Court of Appeals for the Federal Circuit aptly summed up the proper rule — a rule plainly in conflict with the Nevada Supreme Court:

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[9] If the property owner invites third parties onto the property, there is no government liability for regulating the *manner* of such use. (See *Yee v. City of Escondido*, 503 U.S. 519 [1992] [mobile home park owner invited tenants to use the property]; *F.P.C. v. Florida Power Corp.*, 480 U.S. 245 [1987] [power company permitted others to string wires on its poles].)

> "As a general proposition, if the Government for purposes of public use physically occupies, either by its own agents or *by third parties*, privately owned land over the owner's objections, *liability is a foregone conclusion.*" (*Brown v. United States*, 73 F.3d 1100, 1103 [Fed. Cir. 1996; emphasis added].)

The decision below conflicts with each of these decisions, by eliminating compensation as the Constitutional *quid pro quo* for a County regulation that opens private property to public trespass.

This line of decisions was bolstered by Congress when it passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4601 *et seq.*) One of the uniform national policies set out there is that the government shall not "intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) The law's "uniform" nature is enforced by precluding the grant of federal funds to states that do not agree to comply with its policies. (42 U.S.C. § 4655.)

Like other states, Nevada has authorized airport operators to condemn whatever airspace rights are needed for airport purposes. (See App., p. 23.)[10] Clark County chose not to do so, but to attempt to simply

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[10] For an illustration of such a direct condemnation of air rights, see *City of Oakland v. Nutter*, 92 Cal.Rptr. 347 (Cal.App. 1970).

alchemize private property into public domain by resolution, thus violating not only the 5th Amendment, but the Uniform Act as well. As Clark County would have been compelled to pay compensation for these air rights if it had followed the Uniform Act and initiated its own eminent domain action, it cannot be in a legally superior position by violating the statute and compelling these landowners to initiate their own suit.

The County's acquisition of the right to invade this property at will was a *per se* physical taking, as this Court's cases and Congressional enactment confirm.

C

This Court Has Carefully Separated Physical And Regulatory Takings. The Decision Below Makes Hash Of The Court's Design

If any doubt remained about the difference between physical and regulatory takings, the Court dispelled it in *Tahoe-Sierra*, three years ago:

> "This *longstanding distinction* between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, *makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.*" (535 U.S. at 323-324; emphasis added.)

The Nevada Supreme Court crossed that line. It took the facts of this physical invasion case and applied the law of regulatory takings. The conflict with this Court and other courts must not be allowed to stand.

III

THIS COURT'S MOST RECENT CASE INVOLVING AIRPORT OPERATOR RESPONSIBILITY IS MORE THAN 40 YEARS OLD. EXPANSION OF PRECEPTS LAID DOWN AT THE DAWN OF THE JET AGE IS NEEDED

This Court has decided two cases involving issues of airport operator responsibility: *United States v. Causby*, 328 U.S. 256 (1946); and *Griggs v. Allegheny County*, 369 U.S. 84 (1962).[11] That is almost ancient in the context of aviation technology.

Causby (in 1946) and *Griggs* (in 1962) were cases brought by people whose properties were overflown by noisy aircraft to such an extent that the noise itself was held to have taken, or inversely condemned, an easement for flight over the land. Not surprisingly, these early cases involved the nuisance-

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[11] The Court later decided *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), but that case involved only pre-emption of a municipality's *police power* to regulate the use of an airport when the airport is owned and operated by a *different* entity. *Burbank* has no impact here.

like by-products of aviation and questions of the rights of airport neighbors to any relief at all, as well as the distribution of power and responsibility among the federal, State, and local governments.

This Court held that the 5th Amendment requires compensation when federal airport operations substantially impact the property rights of neighbors (*Causby*), that the 14th Amendment transmits that liability to local airport operators (*Griggs*), and that the responsibility for acquiring sufficient property to operate an airport safely and properly belongs to the airport operator, not the federal government (*Griggs*).

Both cases set the stage for later litigation — primarily in State courts — over airport owner/operator liability for the impact of their operations on property owners nearby.[12] Both pre-date the explosive growth of commercial jet aviation and the evolving application of 5th Amendment precepts by State courts. *Griggs*, for example, involved facts arising before the inception of American commercial jet commerce in 1959.

This Court has not considered related issues in more than four decades. As the Nevada Supreme Court could find no other cases dealing with the responsibilities of airport operators, it concluded that

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[12] Although involving the 5th Amendment, federal cases have largely been confined to issues involving the impact of military flights. (E.g., *Brown v. United States*, 73 F.3d 1100 [Fed. Cir. 1996]; *Branning v. United States*, 654 F.2d 88 [Ct. Cl. 1981].)

this Court's interest was restricted to overflight noise issues, and other issues were at large. (App., p. 31.)

State courts have done a consistent job since *Causby* and *Griggs* of holding airport operators liable for takings caused by aviation noise nuisances. (See cases collected in Michael M. Berger, *Airport Noise in the 1980's: It's Time for Airport Operators To Acknowledge the Injury They Inflict on Neighbors*, 1987 Institute on Planning, Zoning, and Eminent Domain, ch. 10, p. 10-19, n. 63 [Sw. Legal Foundation 1987].)

But the States seem to be having difficulty with height limitation/physical invasion requirements like the one at bench, resulting in the drastic split of authority shown above. The Nevada Supreme Court's narrow view of this Court's cases being restricted to noise nuisances is obviously part of the problem. In the same way that commercial airport operations have matured and expanded with the delivery of larger and more sophisticated aircraft, this Court's jurisprudence needs to match that maturity with a modern discussion of airport operator responsibility whose holding goes beyond noise nuisances.

An updated approach is needed because this Court's earlier decisions did not deal directly with the issue presented here. Although both of its earlier cases pointed the way by making airport operators responsible for acquiring whatever adjacent property interests are needed for safe, effective operation, that is apparently not enough for courts like the Nevada

Supreme Court and the others that are on its side of the decisional divide.

As this Court put it in *Griggs*, the responsibility of an agency establishing and operating an airport is no different than an agency building a bridge: a bridge is useless without approach roads, and an airport is useless without similar approaches through the air. In both cases, the facility's sponsor is financially responsible for the acquisition. (369 U.S. at 89-90.)[13]

This case presents a closely related issue: when an airport operator attempts to fulfill its *Griggs* duty to acquire sufficient airspace to ensure safe operation — but does so by ordering adjacent property owners to allow uncompensated flight through their airspace rather than forthrightly buying that right — is the operator liable for a 5th Amendment physical taking for enabling all pilots to use that private property at any time they choose?

In other words, can a municipal airport operator evade its Constitutional *Griggs* responsibility to acquire property for airport operations by ordering neighboring property owners to provide that property *gratis*? The Nevada Supreme Court believed it had *carte blanche* on this issue because this Court had not

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[13] The Nevada Supreme Court acknowledged that "Causby and Griggs are physical takings cases." (App., p. 31.) Its error was in failing to acknowledge that this is a physical taking case too, and is thus governed by the same Constitutional precepts.

yet directly addressed it (although its precepts should have been discernible from *Causby* and *Griggs*).

As shown earlier, the State courts are in conflict on this issue of federal Constitutional law. An answer is needed from this Court, so that property owners receive the same protection against uncompensated physical invasion by aircraft whether they live on the east or west side of the Colorado River, or the north or south side of the Ohio River. (See *ante*, pp. 9, n. 5; 11, n. 6.)

CONCLUSION

Even as the Court is considering this Petition, jet airliners are using Petitioners' property for maneuvering at McCarran International Airport. But the only "remedy" the Nevada Supreme Court offered is pie in the sky, and a vague prospect that "some day your price will come" if Petitioners jump through the inappropriate regulatory hoops — a process that, at best, takes years and often additional litigation (a reality displayed in this Court's regulatory taking cases over the last quarter-century).

However one tries to massage it, and whatever spin one attempts to apply to it, the County's action and intent was to provide airspace into which aircraft landing at or taking off from its airport can physically intrude whenever their pilots desire.

That is a governmental acquisition of a public avigation easement over privately owned, privately

usable land. It is a present physical taking that requires compensation.

At this time, however, State courts are in direct conflict over the 5th Amendment ramifications of this kind of municipal action, and a uniform resolution is needed.

The Petitioners pray that the Court grant certiorari to resolve this constitutional issue.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant/Cross-Respondent, vs. TIEN FU HSU; LISA SU FAMILY TRUST; LISA SU TRUSTEE; PETER B. LIAO; WESTPARK, INC.; LUCKY LAND COMPANY; LUCKY LAND COMPANY INVESTMENTS; LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP; AND WEST PARK COMPANY 1, Respondents/Cross-Appellants.	No. 38853

ORDER OF REVERSAL AND REMAND

(Filed Sep. 30, 2004)

Clark County appeals from an inverse condemnation judgment adjudicating a taking of airspace over real property owned by respondents, Tien Fu Hsu, et al. ("the landowners"). The judgment contained a substantial award of damages pursuant to a jury verdict. The County argues on appeal that the district court erroneously granted partial summary judgment on the issue of liability based upon its conclusion that county, airport height restriction/zoning ordinances effected a "per se" physical taking of the easement. We agree and conclude that this case raises regulatory, not per se physical takings issues. However, we are unable to conclude whether a compensable regulatory taking occurred because the landowners' inverse condemnation claims are not yet ripe for

review on the merits. Therefore, we reverse the district court's judgment and remand this case to the district court for further proceedings to determine whether and the extent to which the height zoning regulations prevent new development of the subject property. On remand, the landowners may ripen their case by submitting meaningful development plans and seeking a variance from the County. Only then will the district court be able to adjudicate the takings issue pursuant to the criteria for regulatory takings.

FACTUAL AND PROCEDURAL HISTORY

This case involves an alleged inverse condemnation of airspace rights near McCarran Airport in Clark County, Nevada. More specifically, the landowners contend that the County's imposition by ordinance of height restrictions near the end of runway 19R/1L at McCarran constitutes a physical "taking" of their property. The affected property consists of seven separate assembled parcels owned by separate individuals or entities, totaling approximately thirty-seven acres.[1]

The County has restricted the height of buildings on property surrounding the airport since 1955 to avoid hazards to air navigation. These restrictions were accomplished by use of four types of zones, the most restrictive being the "runway approach" zone, and decreasing restrictions through "transition," "horizontal," and "conical"

[1] The record does not contain the price paid for these parcels of land. The landowners assert that they purchased these parcels between 1984 and 1992.

zones. These restrictions depend upon proximity to the airport runways.

On January 20, 1981, the County passed Ordinance No. 728, which extended the horizontal zone over the subject property, effectively limiting structures to a height of 150 feet, and placed one corner of the subject property in a transition zone.[2]

The landowners describe a transition zone[3] as an area

> adjacent to the runway "Approach Zone" (i.e., the area actually designed for aircraft to use in normal approach and departure), and is used when aircraft are unable to confine their flight, within the Approach Zone and stray beyond it.

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[2] Ordinance No. 429, passed in 1974, also placed a portion of the landowners' property in the transition zone.

[3] Section 29.50.020(B) of Ordinance No. 728 defined a "transition zone":

> Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically [sic] with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

Ordinance No. 728 affected the property below the "transition surface"[4] by generally prohibiting the construction of structures into the transition zone. In any of the various height zones, a landowner could build structures up to thirty-five feet in height.[5] However, no buildings could be constructed in any zone unless the Federal Aviation Administration (FAA) and the Clark County Director of Aviation determined that the proposed building was situated or marked so as not to constitute a hazard to aircraft navigation. All construction within any of the zones was subject to the requirement that property owners grant an avigation easement in favor of the County.[6]

Ordinance No. 728 did not entirely prohibit nonconforming uses. It established a variance process, which allowed application to the Clark County Planning Commission when an affected property owner desired to build

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[4] An imaginary line running one foot vertically for seven feet horizontally from the approach zone extending to the horizontal and conical zones.

[5] The property was zoned "T-C" (trailer court) at this time. That designation prohibited building structures above thirty-five feet.

[6] The Texas Court of Appeals defines such easements generally as the right to fly over a subject property, and specifically as the " 'right to the navigation of airspace over designated land and to the use of land as an incident to [n]avigation. . . . It provides not just for flights in the air as a public highway, but for flights that may be so low and so frequent as to amount to a taking of the property.' " *City of Austin v. Travis County Landfill*, 25 S.W. 3d 191, 195 n.2 (Tex. App. 1999) (quoting 2A CJS *Aeronautics & Aerospace* § 2 (1972), *reversed on other grounds* by *City of Austin v. Travis County Landfill*, 73 S.W. 3d 234 (Tex. 2002)). Also, in *United States v. Brondum*, 272 F.2d 642, 645 (5th Cir. 1959), the Federal Court of Appeals for the Fifth Circuit noted that an avigation easement "provides not just for flights in the air as a public highway – in that sense no easement would be necessary, it provides for flights that may be so low and so frequent as to amount to a taking of the property."

a structure that would exceed the height limitations. This process allowed variances where

> a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code.

In 1981, Tropicana Enterprises, prior owners of some of the later assembled parcels, requested a zone change from T-C (trailer court) to H-1[7] (limited resort and apartment). It also sought a special use permit and height variance to construct a 1,000 room high-rise hotel with a proposed height of 230 feet; 50,000 square feet of casino, shops and offices; and a five-story parking garage. The prior owner additionally sought a zone change from T-C to R-5 (apartment residential) with regard to another portion of the property, and a special use permit and height variance to construct a 250-unit apartment complex, also with a proposed height of 230 feet. Although the planning commission and the airport authority initially approved the project, the director of aviation lodged written opposition to the project after further review on the basis that the project exceeded transition-zone height restrictions. The applicant modified the proposal to address the opposition by reducing the height of the proposed buildings. However, at a July 7, 1981, meeting, the Clark County Board of Commissioners denied the requests because

[7] H-1 zoning permits structures to 100 feet in height.

Tropicana Enterprises refused to pay relocation costs of the mobile home residents on the property.[8]

In 1990, McCarran began upgrading runway 19R/1L for use by commercial jet aircraft, including expansion of the runway in conformity with the 1979 Clark County master plan. Ordinance No. 1221, effective August 1, 1990, amended Ordinance No. 728, reflecting the changes in the use of the runway.[9]

Ordinance No. 1221 expanded the transition zone. This provision placed the landowners' property further into the zone and thus subjected the property to additional height restrictions.[10] The ordinance required that any person proposing to construct a structure exceeding a height of 200 feet, or one exceeding "[t]he plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway," notify the

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[8] In this, the County was not placed in a position of sustaining or overruling an objection to development by the airport authority involving penetration of transition surfaces. However, this interaction is suggestive of the notion embraced by the district court in its futility findings, that the County would not override airport recommendations, and that transition zone restrictions were of paramount importance to land use approval issues. *See* discussion *infra*.

[9] In September 1996, McCarran received two federal grants to extend the runway. Construction was finished in 1997. The landowners assert that the expansion of the transition zones via Ordinances Nos. 728 and 1221 satisfies FAA requirements for grant approval. In turn, the federal nature of the. project implicated the Uniform Relocation Assistance and Real Property Acquisitions Policies Act ("Federal Relocation Act") (42 U.S.C. §§ 4601-55 (2000) (adopted in Nevada by NRS chapter 342)). *See infra* note 29.

[10] Height restrictions on the property following imposition of Ordinance No. 1221 ranged from approximately 35 feet to 200 feet.

FAA of the proposed construction. The ordinance also provided that the Clark County Board of County Commissioners held final authority to grant variances from the height restrictions. While the slope described in this provision did not precisely correspond to the slope of the transition surface, it provided the minimum criteria for when proposed construction implicated FAA notification.

In 1994, Lisa Su, one of the landowners, granted the County a perpetual avigation easement as a condition of a zone change from T-C to C-2 (general commercial) to place a pair of fifty-foot billboards on one corner of her property.[11] The easement provided for flight across the affected portion of the property (the area over the billboards), as well as the right to cause noise inherent with aircraft flight. She also agreed to release the County and aircraft operators from any loss or psychological harm associated with overflight noise.

On April 23 and June 26, 1994, the County filed separate actions in district court, seeking condemnation of a portion of the subject property for road widening. On November 20, 1995, the landowners counterclaimed, seeking a separate inverse condemnation award.[12] The counterclaim alleged that the County, through the height restrictions in County Ordinance Nos. 728 and 1221, imposed an avigation easement over the property, which

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[11] These billboards exceeded transition zone height limitations at their location.

[12] On January 17, 1997, the district court entered a judgment by stipulation of the parties allowing for the condemnation in aid of the road-building project. The court entered a final order of condemnation on May 12, 1997. Thus, the only remaining issues left to litigate below stemmed from the inverse condemnation action.

resulted in an uncompensated taking due to a substantial reduction in its potential use and value. The landowners contended that they were unaware of the height restrictions on their property until October 1995, and alleged that the ordinances restricted the highest and best use of their property – a hotel/casino facility. Additionally, the landowners alleged that they were not obligated to exhaust their administrative remedies through the variance procedures "because the ordinance provides no variance will be given."[13] Finally, the landowners contended that the avigation easement would lead to increased noise and dust over their property.[14] The landowners requested compensation for the taking, as well as litigation costs and expenses.[15]

In early January 1997, the County moved for summary judgment, arguing that the case raised regulatory takings issues, and that the landowners could not maintain a claim for a regulatory taking without first exhausting their administrative remedies, *i.e.*, by seeking relief from the regulatory measures through a variance application. Without exhaustion, the County asserted, the inverse condemnation claim was not yet ripe for judicial

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[13] The landowners' complaint did not expand on this statement. They later argued in pretrial proceedings that the ordinance provided no variance procedure for proposed construction above the height restrictions, and that the Clark County Board of Commissioners had denied the 1981 variance application submitted by the prior owner. The landowners also later argued that they were not obligated to exhaust their administrative remedies because that requirement did not apply to eminent domain actions concerning per se physical takings.

[14] This portion of the counterclaim was later dismissed without prejudice by stipulation of the parties.

[15] *See* 42 U.S.C. §§ 4601-55 (2000).

determination. On June 17, 1997, the district court concluded that any attempt by the landowners to obtain a variance would be futile and relieved the landowners from further exhausting their administrative remedies.[16] The district court based its ruling in part upon the County's refusal of the 1981 variance application by Tropicana Enterprises. The district court also precluded the County from introducing any evidence at trial of the landowners' knowledge of the height restrictions imposed by Ordinance Nos. 728 or 1221 when they purchased their property. The court concluded that this evidence had no material bearing on the landowners' ability to obtain compensation.

In August 1997, for litigation purposes only, the landowners submitted a hypothetical 240-foot building plan to the FAA.[17] The proposal placed the building ten feet east of the landowners' eastern property line, into an area severely affected by the height restrictions. The FAA concluded that while the proposed building exceeded the transition slope by 148 feet, this finding alone did not mean that the building would constitute a hazard to aircraft navigation. After further study, the FAA concluded

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[16] The district court relied upon *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), in reaching this conclusion.

[17] The landowners later stated that they submitted these plans to the FAA "only to get a preliminary reading from the FAA as to what criteria would be used by the FAA to determine whether a structure on the landowners[']' property would be permitted." The landowners also explained that the "sole purpose in submitting [the plans] to the FAA was to find out whether there were any surfaces, in addition to the height restrictions placed on the property by ordinance, that would impact the ability to construct a high rise hotel on the property."

The County unsuccessfully sought to admit the landowners' plans and subsequent FAA ruling at trial to discount the landowners' argument that the transition slope was impenetrable.

that the hypothetical 240-foot building would exceed "Terminal Instrument Procedures" criteria for runway 19R/1L by seventy-one feet, thus adversely impacting new minimum clearances for precision landings. Accordingly, the FAA explicitly indicated that, if the landowners would reduce the height of the proposed structure by seventy-one feet, or locate the structure 225 feet to the west, it would have no impact on aeronautical operations or aircraft navigation.[18] Implicitly then, the FAA would conceivably approve the construction of structures on the subject property that would penetrate the transition zone.[19]

On September 2000, Lisa Su testified by deposition that, as of 1986, she owned an interest in the subject property through her involvement with the Lucky Land Company. Litigation arose in 1987 between several owners

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[18] It appears from the record that moving the proposed building location 225 feet west would place it on the landowners' property.

[19] An affidavit in the record of William Keller, Principal Planner for the Clark County Department of Aviation, submitted in support of a pre-trial offer of proof by the County, indicates that the Stratosphere Tower near downtown Las Vegas penetrates the transition zone for runway 19R at McCarran International Airport, and that the Hard Rock Hotel and Casino located on south Paradise Road in Clark County penetrates the approach and transition surfaces for runway 19R. The district court did not have this information available to it when it made its futility ruling. However, as discussed below, this information is relevant to our examination of the regulatory takings issues.

Further, the affidavit by Teresa Arnold, an airport planner in the Planning and Environment Division of McCarran, established that between early 1995 and 1997, the County considered at least fourteen applications for height variances, ranging from eighty feet (the Homewood Suites) to 1,149 feet (the Stratosphere tower). Of these, all gained approval, except one, which was withdrawn prior to a determination. We note that these variances were not restricted to the close proximity of the airport.

of the property, which precluded Su from engaging in any development. Su acquired title to her parcels in the name of her trust in 1992 following litigation. She stated that she did not develop the property at that time, because she lacked sufficient funds. She testified that she never commissioned feasibility studies, pro forma statements or financial calculations, never spoke with hotel operators about possible utilizations of the property, and never applied for a height variance to allow for a hotel/casino project. She did, however, testify to discussions of some kind concerning a possible hotel/casino project and that, with adequate financial resources, she would have proposed a building of maximum height to optimize the property's economic potential.

Su derived monthly, income of $15,000 from two of the mobile home parks and a bar on the property, as well as the two billboard sign rentals. She also confirmed that no changes in the use of the assembled properties had occurred since 1986, and that, at the time of trial, no current development plans were actually contemplated. She testified that she was unaware of any height restrictions on the property until 1995 or 1996, at which time she abandoned any plans for a hotel/casino.

Tien Fu Hsu also testified by way of deposition to his ownership/management of a nine-unit apartment building and a third mobile home park on his portion of the assembled property. Hsu stated that he had considered development, but did not aggressively pursue any project. Hsu had developed architectural plans for a hotel/casino with a previous owner, but as of September 2000, he entertained no plans to build anything higher than twenty-two stories. He testified he had not commissioned a study to determine how to best develop the property, never filed an application

for a zone change, and had left any plans for the property "to the future."

West Park, Inc., a closely held corporation controlled by Mr. Hsu, owned some of the subject parcels. In answers to written interrogatories, West Park denied creating plans for development outside of this litigation. Although renouncing any intent to develop the parcels on its own, West Park's interrogatory answers indicated Mr. Hsu's desire to join the corporate property with adjacent property to the west for development as a hotel/casino.

Tami Campa, a commercial real estate appraiser and licensed broker for the landowners, provided a pretrial affidavit regarding her appraisal of the property. She concluded that "a typical buyer would have the expectation of having the potential to build to a height of 400 feet, or over." She based this conclusion on her observation of the market, personal interviews, maps of the hotel towers near the property, and the deposition testimony of former Clark County Zoning Administrator Greg Borgel that: "everybody would like to go at least 400 feet." Based upon this 400-foot figure, Charles Brechler, the landowners' consulting engineer, calculated that the County took 4.4 percent of the landowners' airspace under Ordinance No. 728, and 59.3 percent under Ordinance No. 1221.[20]

On December 19, 2000, the landowners renewed a prior motion for partial summary judgment on the issue of liability. They contended that the loss of airspace through

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[20] These calculations were attached to the landowners' appraisal report. Other appraisers hired by the landowners (*e.g.*, James Himes) relied upon Brechler's conclusions in calculating the amount of airspace taken by the ordinances.

the height restrictions constituted a "per se" physical taking of their property, thus entitling them to compensation. In this, the landowners relied upon the deposition testimony of William Dunlay, the County's aviation expert:

> Q. Your understanding of that transition zone is that it creates a surface above which there are going to be issues about whether or not somebody can penetrate it from below. Correct?
>
> A. Yes.
>
> Q. And the reason that's done is because planes may on occasion need to go into that area for aeronautical operations. Correct?
>
> A. Yes. That's my understanding, just to provide some maneuvering room down close to the runway.
>
> Q. For airplanes to go into if they need to; correct?
>
> A. Yes.
>
> Q. And that may happen twice in a month or it may happen never in a year; is that correct? You just don't know?
>
> A. Don't know. . . .
>
> Q. And is there any way, in your mind, of knowing when that actual transition zone surface is used by an airplane?
>
> A. Not really, no.

The County filed a countermotion for summary judgment on liability and argued, in part, that the landowners' claims were not yet seasonable for judicial resolution. The County based its ripeness arguments on the

landowners' failure to submit development plans or seek a variance from the County and, thus, their failure to obtain a "final decision" regarding the application of the ordinances to the subject property. In this, the County sought de facto reconsideration of the district court's previous futility ruling relieving the landowners from exhaustion of administrative remedies through a variance process.[21]

The landowners responded with the deposition testimony of Robert Broadbent, former Director of Aviation at McCarran, in which he described the airport zoning variance processes. He testified that in 1995, the landowners would have had to file any proposal for construction with the FAA.. The landowners' counsel sought to establish what McCarran's stance would have been regarding proposed construction on the subject property:

> Q [landowners' counsel]: And if my clients had wanted to build a hotel/casino on their property that was, let's just say 22 stories in height, can you tell me what your response would have been?
>
> A [Broadbent]: No.
>
> Q: You can't tell me what it would have been, or it would have been "no"?
>
> A: I couldn't tell you what it would have been, because I don't know. I mean, you might get in the west part of the property and be able to go 22 stories.

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[21] *See* NRCP 54(b).

Q: Let's say that my clients wanted to build some structure on that property that went above what the ordinance said for the transition zone?

A: The airport would oppose it.

Q: And do you feel that – again, I understand nobody can –

A: It was interpreted by FAA to be a hazard.

Q: What if it wasn't? Did you have somebody at McCarran who actually looked at the ordinances?

A: If it didn't meet the qualifications of the ordinances in place, we would oppose it.

The landowners' counsel also sought to establish whether McCarran uniformly disapproved of transition zone variance applications:

Q: Can you think of a time from March of 1986 until your retirement as Director of Aviation in May of this year [1997] where McCarran opposed an application for a variance or a special-use permit so that somebody could build above the height restrictions set forth in the ordinance concerning airport height limits?

A: I don't remember the County Commission going against the recommendation of the airport, if the airport could show that it was the position of FAA and reasonably might limit the ability of airplanes to land or take off at McCarran.

. . . .

> Q: Can you remember as your tenure of Director of Aviation the County Commission ever granting a variance from the height restriction ordinance – for the airport height restriction ordinance for the transition zone?
>
> A: No.

While the landowners asserted that Mr. Broadbent's testimony established that they could never have obtained a transition zone variance, Mr. Broadbent's testimony on this point is equivocal, and other evidence in the record suggests that the transition surface was permeable, conditional upon an FAA determination that proposed construction would not create a hazard to aircraft navigation.[22]

In an order dated January 26, 2001, the district court concluded that it could determine whether the ordinances constituted a taking through summary judgment, that condemnable airspace rights existed,[23] that "aircraft do go through the airspace above the Landowners' properties[,] and that the airspace is necessary and used by the airport [for the public good]." The court also noted that, while it was unclear how often airplanes invaded the airspace over the property, it was clear that "the space is necessary and that it is used." Also, notwithstanding Mr. Broadbent's

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[22] In fact, as noted, a transition zone variance was granted for the billboards on Ms. Hsu's parcel and other property owners obtained variances for property surrounding the airport. *See supra* note 19. As. also noted, the FAA approved theoretical penetrations into the transition zone for the purpose of this litigation.

[23] For these conclusions, the district court relied on *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); and NRS 497.270.

testimony as described above, the court commented that Mr. Broadbent's testimony was that "he would have personally blocked any request for a variance" on the landowners' property and that the County was unable to produce any evidence that transition-zone properties could gain variances. The court ruled:

> The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In *Nollan*[24] . . . the Court points to the fact that not only is the landowner limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property. In *Loretto,*[25] the small metal boxes and cable wires/waves constitute enough of an invasion to property to fall into the *Causby*[26] type takings and require compensation.

The district court went on to determine that

> the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the [landowners]. This results is a "per se" taking that requires just compensation.

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[24] *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).

[25] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

[26] *United States v. Causby,* 328 U.S. 256 (1946).

On this basis, the court granted partial summary judgment on liability in favor of the landowners. Because per se physical takings do not implicate "exhaustion" of administrative remedies, the district court impliedly rejected the County's countermotion for summary judgment based upon the landowners' failure to seek a variance from the height restrictions.[27]

Before trial on the issue of damages, the district court ruled that the County could not present the following evidence to the jury: evidence of zoning and variance procedures, or that the case involved zoning ordinances; evidence of airport zoning height restrictions preexisting November 20, 1995, that may have impacted the landowners' property;[28] evidence related to the avigation easement Lisa Su granted to the County contingent on her request for the two billboards; any evidence relating to Ordinance Nos. 728 and 1221; and any information related to FAA issues or procedures. The district court also denied a 'majority of the County's offers of proof, including proof that the airport zoning regulations only served to trigger analysis by the FAA, and proofs concerning variances actually given.

The case proceeded to jury trial on February 27, 2001. James Himes, a real estate appraiser for the landowners, testified that the highest and best use of the property was

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[27] We note in passing that the district court's futility ruling bolstered its ultimate finding that a per se taking had occurred, *i.e.*, the court's finding that the landowners could not obtain a variance to build into the transition zone confirmed that the county took a complete easement over the landowners' property. However, as noted below, the futility and per se takings findings were made in error.

[28] November 20, 1995, was the date of taking utilized at trial.

a 400-foot hotel, concluding that the height restrictions devalued the property by $24,027,000. Himes also stated that "all hotels" could obtain a height waiver or use permit to exceed the 100-foot limit under H-1 zoning, if the proposed construction was compatible with the surrounding neighborhood. The landowners' second appraiser, Campa, concluded that the landowners were entitled to $25,000,000 of just compensation due to the height restrictions, based upon a "feasibility test" for the highest and best use in the area of the airport.

Greg Borgel testified for the County that H-1 zoning allows limited resort and apartment development, and requires a conditional use permit for gaming or structures over 100 feet in height. He stated that, in 1995, the landowners likely could have obtained a change in zoning from T-C to H-1. However, he did not believe the County would approve a conditional use permit for a 40-story/400-foot structure because of incompatibility with the character of adjacent, low-rise uses. He believed a low to mid-rise structure would have been compatible.

Shelli Lowe, an independent real estate appraiser, testified for the County that the height restrictions effectively devalued the assembled property by $5,320,000. She stated that the landowners only suffered a fourteen percent diminution in value because the restrictions caused no loss of property footage, and because they could still develop the property in the after condition, albeit under the height limitations. Consistent with pre-trial evidentiary rulings, Lowe did not testify as to the development potential of the property under the airport zoning variance process.

The jury returned a $13,000,000 verdict in favor of the landowners. Thereafter, the district court entered its final judgment in the case: $22,107,674.13 (the thirteen million dollar verdict plus prejudgment interest, costs and attorney fees),[29] with post-judgment interest to accrue daily until satisfaction of judgment. The judgment also provided a legal description of the easement, and ordered immediate deposit of the total judgment amount with the district court clerk.

The County appeals and the landowners cross-appeal. Amicus curiae briefs in support of the County's position on appeal were filed by the City of Las Vegas, the International Municipal Lawyers Association, the State of Nevada, the Airports Council International-North America, the American Planning Association and its Nevada Chapter, the Tahoe Regional Planning Agency, and the Airport Authority of Washoe County. Defenders of Property Rights, Inns Nevada, LLC, Hotels Nevada, LLC, and the Pacific Legal Foundation filed amicus curiae briefs in support of the landowners.

DISCUSSION

The County seeks reversal, in large part, based upon the district court's futility findings and its partial summary judgment order declaring that the ordinances constituted a per se physical taking under the Fifth Amendment to the United States Constitution. We review a district

[29] The district court also awarded the landowners attorney fees and costs based upon the Federal Relocation Act. Additionally, the court, reduced the jury award by the value of the avigation easement over the property for billboards. The landowners disputed this reduction.

court's grant of summary judgment and any questions of law de novo.[30] "On appeal from a summary judgment, this court may 'be required to determine whether the law has been correctly perceived and applied by the district court.' "[31] At the outset, we note that there are two general types of takings under the Fifth Amendment, takings by physical acquisition and takings by virtue of government regulation.

Lines of demarcation in this appeal

Three main issues are presented in this case: first, whether the landowners enjoyed property rights in the airspace over the assembled parcels; second, whether the height restrictions constituted a per se physical taking of an "avigation easement" over the property; and third, if no per se physical taking occurred, whether the ordinances have effected a regulatory taking of the property. Here, the County argues that the landowners enjoyed no rights in the airspace over the property, but assuming they did enjoy such rights, no taking, either physical or regulatory, occurred as a matter of law. In this, the County urges that the takings issue must be resolved under regulatory takings jurisprudence. On the other hand, the landowners argue the existence of airspace rights under state and federal law, but also argue that the height ordinances effected a per se physical taking as a matter of law. Thus,

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[30] *Pressler v. City of Reno,* 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

[31] *Calloway v. City of Reno,* 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000) (quoting *Mullis v. Nevada National Bank,* 98 Nev. 510, 512, 654 P.2d 533, 535 (1982)).

the landowners contend that the laws governing regulatory takings are not at all implicated.[32]

Accordingly, the parties urge diametrically opposed legal constructs as governing the resolution of this appeal, and both sides claim that they are entitled to a determination on the takings issue as a matter of law.

Because the cases cited by both parties are factually intensive, and because different states have applied discrete state constitutional and state policy considerations to such claims, we must determine under the evidence presented below whether either side is entitled to judgment as a matter of law on the takings issue.

We conclude that the district court erroneously determined that the ordinances passed in aid of the various airport expansions over the years since 1955 effected a per se physical taking of the subject properties. We also conclude that this case raises regulatory takings issues, not per se physical takings issues. Generally, subject to certain exceptions, a landowner must first pursue, or exhaust, all available administrative remedies in order to establish a regulatory taking. Thus, before undertaking any analysis of the regulatory takings issue, we must resolve whether the landowners were required to take advantage of the variance process. As discussed below, we conclude that the district court also erred in determining, as a matter of law, that any attempts at approval of a high-rise project would have been futile,[33]

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[32] The landowners alternatively argue that the partial summary judgment was correct in its result under a regulatory takings analysis.

[33] The order granting partial summary judgment finding that a per se taking occurred rendered the previous futility finding moot with

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and also conclude that the landowners' failure to seek regulatory redress in this instance is fatal to a regulatory takings claim. In this we recognize that the ordinances may have limited the possible range of development on the subject assembled parcels, but we cannot conclude that a regulatory taking has occurred because the landowners failed to submit a meaningful and concrete plan for high-rise development for County approval. Therefore, the failure to exhaust administrative remedies provided by the variance processes set forth in the ordinances renders the entire controversy unripe. Accordingly, we reverse the district court's judgment and remand this matter for exhaustion of administrative remedies. Once that process is completed, the district court may consider the takings issue under *Penn Central Transportation Company v. New York City*,[34] the seminal authority defining landowner rights in the context of regulatory takings claims.

Property interest

The County contends that the district court erred in failing to conduct a preliminary investigation addressing whether the landowners owned a vested property right in the airspace above the property. We disagree.

NRS 37.010(14) recognizes that eminent domain may be exercised for "[a]irports, facilities for air navigation and aerial rights-of-way." Additionally, while NRS 493.030 declares state government sovereignty in the airspace

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respect to the trial proceedings. Exhaustion of administrative remedies is only pertinent to a regulatory takings case.

[34] 438 U.S. 104 (1978).

above the land and water in the State of Nevada,[35] NRS 493.040 qualifiedly vests ownership of the space above land and water in the owners of that property, subject to the right of flight.[36] Thus, the landowners owned the airspace above their property, subject to intrusion by lawful air flight.

NRS 493.050(1)(a) states that air flight is lawful unless it interferes with the "then existing use to which the land or water, or the space over the land or water, is put by the owner." Therefore, airplanes may fly over the landowners' property so long as they do not interfere with the current use of the property.[37] NRS 493.030, NRS 493.040 and NRS 493.050 do not eliminate the landowners' right to their airspace. Thus, the district court properly found that the landowners held a property right in the

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[35] NRS 493.030 states:

> Sovereignty in the space above the lands and waters of this State is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State.

"Sovereignty" is defined, in part, as "freedom from external control" or "one that is sovereign, especially an autonomous state." *Merriam-Webster's Collegiate Dictionary* 1125 (10th ed. 1993).

[36] NRS 493.040 states:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in NRS 493.050.

"Ownership" is defined as "the state, relation, or fact of being an owner." *Merriam-Webster's Collegiate Dictionary* 1125 (10th ed. 1993).

[37] While the County contends it obtained a prescriptive easement over the airspace, we conclude that the facts of this case did not establish the existence of such an easement. The ordinances in question do not constitute an adverse occupation of the airspace in this case.

airspace above their property.[38] However, this conclusion does not, of necessity, result in a right of compensation under state or federal law.[39] We must therefore consider whether the district court applied the correct legal analysis in granting summary judgment on liability.

Physical and regulatory takings

The United States and Nevada Constitutions require the payment of "just compensation" when private property is taken for public use.[40] Before 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a

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[38] The County also argues that the landowners never obtained a vested property right in their airspace because they failed to obtain zoning or use permit approvals to undertake a project to use the airspace, and thus their airspace was not constitutionally protected from uncompensated takings. This argument lacks merit. NRS 493.040 vests the ownership in the space above land and water in the owners of that property.

[39] *See, e.g., Penn Central,* 438 U.S. at 130 (landowners argued that regulations prohibiting construction of a high-rise office building deprived them of "air rights"; Court concluded that landowners could not establish a taking simply by showing they were denied the ability to use a property interest they previously believed was available for development); *see also Hadacheck v. Los Angeles,* 239 U.S. 394 (1915) (ordinance valid although it prohibited highest and best use of property as a brickyard).

[40] [P]rivate property [shall not] be taken for public use, without just compensation"; U.S. Const. amend. V. "Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const. art. 1, § 8, cl. 6.

'practical ouster of [the owner's] possession.'"[41] However, in *Pennsylvania Coal Co. v. Mahon*, the United States Supreme Court determined that state regulation of property may also require just compensation, observing that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[42] Thus, two categories of takings may occur for which just compensation is required: "physical takings," where the government physically occupies or invades property or authorizes another to do so; and "regulatory takings," where government regulation goes "too far." In a physical taking, government has an automatic categorical duty to compensate an affected property owner to the extent of the intrusion. With regard to regulatory takings, not all situations in which government has removed some value from property by regulation require compensation.[43] As the Court has noted, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[44] A trial court must draw a discrete balance[45]

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[41] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Legal Tender Cases*, 12 Wall. 457, 551 (1871)) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

[42] 260 U.S. 393, 415 (1922).

[43] See *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[44] *Pennsylvania Coal*, 260 U.S. at 413.

[45] *See Marshall v. Dept. of Water and Power*, 268 Cal. Rptr. 559, 568 (Ct. App. 1990) (" '[t]he determination of whether an inverse taking has occurred is a nonjury question, even when there are factual questions involved' ") (quoting *Redevelopment Agency v. Tobriner*, 200 Cal. Rptr 364, 370-71 (Ct. App. 1984)); *see also San Diego Gas & Elec. Co. v. Superior Ct.*, 920 P.2d 669, 705 (Cal. 1996); *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1124-27 (Conn. 2002); *Foster v.*

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based upon judgment and logic to determine when a land use regulation effects a compensable taking.[46]

Physical occupations and invasions

Physical occupation and invasion cases are "relatively rare [and] easily identified,"[47] and "[w]hen the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed."[48] For situations where the government specifically condemns or physically occupies property, straightforward per se rules apply.[49] Such an occupation effects a taking "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal

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City of Gainesville, 579 So.2d 774, 776 n.2 (Fla. Dist. Ct. App. 1991); *Rueth v. State*, 596 P.2d 75, 94-95 (Idaho 1979); *Van Dissel v. Jersey Central Power & Light Co.*, 438 A.2d 563, 568-69 (N.J. Super. Ct. App. Div. 1981); *Alevizos v. Metropolitan Air. Com'n of Mpls. & St. P.*, 216 N.W.2d 651, 660-61 (Minn. 1974). *But see Monterey v. Del Monte Dunes at Monterey. Ltd.*, 526 U.S. 687 (1999) (jury trial required in 42 U.S.C. § 1983 action on question of whether landowner had been denied all economically viable use of land); *Thornburg v. Port of Portland*, 415 P.2d 750, 752-53 (Or. 1966) (jury decides whether interference with use and enjoyment of land is sufficiently substantial to result in a loss of value and therefore constitute a taking).

[46] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 1986) (in determining where mere regulation ends and taking begins, the Court relies " 'as much [on] the exercise of judgment as [on] the application of logic' ") (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

[47] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002).

[48] *Id.* at 322 n.17.

[49] *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 233 (2003).

economic impact on the owner."[50] Thus, the government "has a categorical duty to compensate the former owner."[51]

The United States Supreme Court has held in several situations that just compensation was due for a per se physical invasion or occupation, as when government dams a river and floods upland parcels,[52] government seizes and operates a coal mine,[53] airplanes make frequent and low over-flights of property,[54] government attempts to require public access to private property,[55] or when government authorizes a cable company to install cable boxes on apartment buildings.[56] However, other measures taken by government have not resulted in physical takings, *e.g.*, mobile home rent control ordinances restricting evictions,[57] ordinances requiring a shopping center to permit distribution of literature on its property during business hours,[58] or when buildings are damaged during riots while under the protection of federal officers.[59]

Here, in determining that the zoning ordinances expanding the McCarran transition zone effected a per se

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[50] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

[51] *Tahoe-Sierra*, 535 U.S. at 322.

[52] *United States v. Cress*, 243 U.S. 316 (1917); *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871).

[53] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[54] *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

[55] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[56] *Loretto*, 458 U.S. 419.

[57] *Yee v. Escondido*, 503 U.S. 519 (1992).

[58] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[59] *YMCA v. United States*, 395 U.S. 85 (1969).

physical taking of the landowners' property, the district court observed that "[t]he Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases." In reaching this conclusion, the district court performed a combined analysis of the United States Supreme Court's per se takings overflight cases, *United States v. Causby*[60] and *Griggs v. Allegheny County*,[61] with *Loretto v. Teleprompter Manhattan CATV Corp.*,[62] a case involving a physical occupation of property, and *Nollan v. California Coastal Commission*,[63] a case involving an easement imposed by government authorities as a condition to issuance of a building permit. While the district court's analysis of the *Causby*-type overflights cases, the *Loretto*-type physical occupation cases, and the *Nollan*-type dedication/exaction cases was a novel approach, the district court erred in its amalgamated reliance upon them.

The United States Supreme Court's physical takings cases involving overflights show a common theme: that when frequent and low airplane overflights substantially devalue the current use and enjoyment of property, a compensable event occurs. In *Causby*, a chicken farming business was destroyed after low and frequent overflights by military aircraft caused the chickens to reduce egg production and to die from fright.[64] The Court noted that, if the flights rendered the farmer's land uninhabitable, it

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[60] 328 U.S. 256.

[61] 369 U.S. 84.

[62] 458 U.S. 419.

[63] 483 U.S. 825 (1987).

[64] *Causby*, 328 U.S. at 259.

would be as if the government "had entered upon the surface of the land and taken exclusive possession of it."[65] Certainly, the limitation on the land's utility profoundly diminished its value.[66] The Court therefore held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[67] Because the findings of the lower court in *Causby* established that the flights directly caused the diminution in value, the Court agreed that a servitude had been placed upon the land for which the farmer was entitled to compensation.[68]

In *Griggs*, the Court considered whether a county-operated airport took an easement over a house through noise and air pollution from frequent and low overflights.[69] The Court noted that "use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"[70] Based upon evidence that the homeowners abandoned their residence because they became "nervous and distraught"

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[65] *Id.* at 261.

[66] *Id.* at 262.

[67] *Id.* at 266.

[68] *Id.* at 266-67.

[69] *Griggs*, 369 U.S. at 85, 87. The Court stated that the holding in *Causby* was "that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of an air easement for which compensation must be made." *Id.* at 88.

[70] *Id.* at 89 (citation omitted) (quoting *Causby*, 328 U.S. at 265).

from extreme noise generated by airplane overflights,[71] the Court held that a compensable event had taken place.[72]

In *Causby* and *Griggs,* landowners presented evidence of frequent and low overflights, which diminished the value of the existing use of their property. Thus, other courts have interpreted *Causby* and *Griggs* to require that a prima facie case for inverse condemnation based upon a physical taking must include evidence of low and frequent overflights causing a direct and immediate interference with the enjoyment and use of the land.[73] We agree. *Causby* and *Griggs* did not concern the regulation of property as implied by the district court, but rather the resultant, effect of overflights upon subjacent land. In actuality, *Causby* and *Griggs* are physical takings cases.

The landowners in this instance chose not to pursue their noise claim and presented insufficient evidence of direct overflights to establish a case under *Causby* or *Griggs.*[74] The only evidence the landowners provided to the

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[71] *Id.* at 87.

[72] *Id.* at 90; *see also id.* at 91 (Black, J., dissenting) (agreeing "with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and enjoyment of petitioner's property as to amount to a 'taking' of it under the *Causby* holding").

[73] *See Brown v. U.S.,* 73 F.3d 1100 (Fed Cir. 1996); *Village of Willoughby Hills v. Corrigan,* 278 N.E.2d 658 (Ohio 1972).

[74] *See Brown,* 73 F.3d at 1104, which states:

> [U]nlike a government invasion of the surface land itself, an invasion of airspace above surface land does not *per se* constitute a taking. However, under *Causby* and its progeny, once the surface owner proves that low-level overflights result in direct, immediate, and substantial interference with the enjoyment and use of the property,

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district court regarding overflights was Dunlay's testimony that overflights might occur, but at what interval he did not know. While the landowners may be able to establish a *Causby* type takings case in the future, Dunlay's testimony was insufficient to establish a physical invasion or occupation requiring just compensation. Further, it is undisputed that the use of the property in the "before" condition has remained unaffected by the ordinances and, certainly, the height restrictions have not displaced these landowners. Thus, the district court erred in relying upon *Causby* and *Griggs*.

The district court also erroneously relied upon *Loretto*. In that case, a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The landowner in *Loretto* did not discover the cables until after purchasing the building. The Court concluded that the installed cable constituted a permanent physical occupation, which required compensation. The Court narrowly defined its holding to "affirm the traditional rule that a permanent physical occupation of property is a taking."[75] In the present case, the district court viewed the zoning ordinances not as valid height restrictions, but rather as

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the owner establishes a taking for which the Constitution mandates just compensation.

See also La Salle National Bank v. County of Cook, 340 N.E.2d 79, 89 (Ill, App. Ct. 1975) (considering an airport height zoning ordinance and noting that "interpreting overflights as 'takings' within the meaning of the fifth amendment would seem to be more the exception than the rule").

[75] *Loretto*, 458 U.S. at 441; *see also Kaiser Aetna*, 444 U.S. 164 (government attempt to grant public access to a private marina without cost).

permitting physical occupation of the property through airplane overflights. The County ordinances at issue did not permit third parties (airplanes) to use or occupy the landowners' property to the extent that a per se physical taking has occurred, however, because NRS 493.050[76] establishes a right of flight across private property in Nevada.[77] Thus, *Loretto* is inapposite to this inquiry.

The district court also relied upon *Nollan* for its analysis of the County ordinances. In *Nollan,* property owners sought a permit to replace a beachfront home with a larger one. The California Coastal Commission conditioned issuance of the permit on the transfer of an easement that would allow public access to adjacent public beaches. The rationale for the condition was protection of the public's ability to see the beach, and that the larger structure would worsen the visual barrier between a public road serving the area and the beaches and, thus, create a "psychological barrier" to beach access.

The Court noted that, had the California Coastal Commission simply and unconditionally required the Nollans to convey an easement across their property, eminent domain principles would have been implicated;[78] but that, because the Coastal Commission could forbid construction altogether, it could also impose conditions on construction in harmony with the police power considerations empowering it to deny construction permits without

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[76] *See also* 49 U.S.C. § 40103 (2000).

[77] *Cheyenne Airport Bd. v. Rogers,* 707 P.2d 717, 722-25 (Wyo. 1985) (airport zoning ordinances did not permit overflights; rather, permission came from state and federal statutes permitting aircraft navigation).

[78] *Nollan,* 483 U.S. at 836.

running afoul of the Fifth Amendment. From this, the Court reasoned that a condition would be valid, *i.e.*, no inverse condemnation would occur, if, for example, it required the property owners to provide or dedicate a viewpoint on their property for passersby to see the ocean,[79] but that [t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[80] Under these principles, the Court went on to hold that requiring an easement as a condition for permit approval constituted a taking because the dedication of the easement bore no "essential nexus" to the harm the local government sought to address, *i.e.*, the easement did not improve the view.[81]

The case before us does not concern exaction of a condition to the approval of a development proposal. Rather, the ordinances at issue here are of general applicability to airport area property owners and constitute a legitimate exercise of the County's police powers to prevent public hazards.[82] While the County may at some

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[79] *Id.* at 836-37.

[80] *Id.* at 837.

[81] *Id.* at 838-41 (holding in part that the commission's, imposition of the access-easement condition could not be treated as an exercise of land-use police power since the condition did not serve public purposes related to the condition; – of the rationales put forth to justify the condition, protection of the public's ability to see the beach and ameliorating a "psychological barrier" to beach use, none was plausible); *see also Dolan v. City of Tigard,* 512 U.S. 374 (1994) (government must demonstrate that condition sought for granting a development permit meets essential nexus test and is roughly proportional to the problem created by development).

[82] Of course, each parcel in the area may be affected by the ordinances in different ways and to different extents, depending upon location.

future time exact conditions on granting a variance to construct a hotel/casino that would constitute a taking, the landowners have not yet attempted to obtain such a variance.[83] Thus, while *Nollan* is a physical takings case, it is not implicated in this matter and the district court erred in relying on it.

The landowners rely upon several state court decisions to support their argument that airport height restrictions effect a per se physical taking of property. However, many of the cases cited by the landowners do not support the proposition that, in and of themselves, airport height ordinances automatically create a right of compensation. The affected parties in some of the cases alleged or presented sufficient facts to state a cause of action, *i.e.*, frequent and low overflights;[84] in others, which are actually regulatory takings cases, the airport height regulations completely deprived the landowner of any beneficial use in the property,[85] the regulating body attempted to

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[83] *See* discussion of regulatory takings below.

[84] *Sneed v. County of Riverside,* 32 Cal. Rptr. 318 (Ct. App. 1963) (court overruled demurrer to complaint for inverse condemnation; complaint stated causes of action by alleging low and frequent overflights and through airport zoning height regulation); *Ackerman v. Port of Seattle* 348 P.2d 664 (Wash. 1960), *abrogated by Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle,* 548 P.2d 1085 (Wash. 1976) (overruling a district court's dismissal of property owners' complaint and holding that frequent and low overflights over property amounted to a taking). *But see United States v. 48.10 Acres of Land, Etc.,* 144 F. Supp. 258, 265 (S.D.N.Y. 1956) (federal government required to pay for devaluation of property following height restrictions and an easement it purchased because property was less valuable for residential development due to easements).

[85] *Peacock v. County of Sacramento,* 77 Cal. Rptr. 391 (Ct. App. 1969) (airport zoning ordinance and subsequent government action that

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pass retroactive limitations on property,[86] or the regulatory body lacked statutory authority to pass airport zoning ordinances to restrict structure height and the use of property.[87] We conclude that a rule supporting the notion that airport height-restriction ordinances, of necessity, effect per se physical takings, is overbroad in its reach and thus, not in harmony with the condemnation laws of this state.[88] We therefore embrace the modern trend that airport height zoning ordinances, as a valid exercise of

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prevented landowner from any development and left landowner with no beneficial use in property for several years was a compensable taking).

[86] *Ky. Airport Zoning Com'n v. Ky. Power Co.*, 651 S.W.2d 121 (Ky. 1983) (court concluded that the airport zoning commission could not impose regulations retrospectively; to enforce its orders, the zoning commission was required to pay just compensation).

[87] *Yara Engineering Corporation v. City of Newark*, 40 A.2d 559 (N.J. 1945) (state enabling statute did not give city authority to pass airport zoning ordinances; accordingly, such ordinances interfered with existing property rights requiring compensation to affected landowners).

[88] *But see Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964) (holding that airport height ordinance was not a valid exercise of police power because it took property for a public use without just compensation); *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237 (Ind. 1963) (structures and toll road encroached into an airport height limitation zoning area – court concluded that limitation was not an exercise of police power, but a taking for public use); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) (because zoning regulations were designed to benefit a specific government enterprise, landowners who suffered a substantial diminution in the value of their property were entitled to compensation); *Jackson Municipal Airport Authority v. Evans*, 191 So. 2d 126 (Miss. 1966) (although finding that airport zoning ordinance was generally valid, airport authority could not remove the tops of trees that grew into a restricted height elevation without paying compensation).

police power, are not the definitional equivalent of a per se physical taking.[89]

In this instance, there was no per se physical taking as there was no actual physical appropriation of, or physical ouster from, the airspace or any other portion of the subject property. First, the property was and could be further developed within the height restrictions.[90] Second, the landowners could still conceivably develop structures within the affected airspace via the variance process.[91] Additionally, no avigation easement was created by the

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[89] *See Harrell's Candy Kitchen v. Sarasota-Manatee Air. A.*, 111 So. 2d 439, 443 (Fla. 1959) (upholding validity of airport height restrictions without payment of just compensation. The court stated, "We can think of no situation which more clearly authorizes the exercise of . . . the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and landing as well as those living in the vicinity thereof"); *La Salle National Bank*, 340 N.E.2d 79 (airport height zoning regulations were a proper exercise of police power to protect the public from air hazards; the regulations were not an appropriation of private property for public use); *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992) (airport zoning ordinance did not create a physical invasion taking); *Village of Willoughby Hills*, 278 N.E.2d 658 (regulations were a proper exercise of police power and no compensable taking because landowners did not allege low and frequent flights over their property); *Cheyenne Airport Bd.*, 707 P.2d 717 (ordinances did not create flight easement; rather, they were created by state and federal declarations of navigability and ordinances were a proper exercise of police power to protect the easement from surface activities); *see also* Clyde L. MacGowan, Note, *Airport Zoning as a Height Restriction*, Vol. 13 Hastings L.J. 397 (1962) (urging courts to uphold the validity of height zoning as a proper exercise of the police power).

[90] *See supra* note 19.

[91] *Id.*

ordinances in question here. Under *City of Austin* and *Brondum,* a general right to fly over property does not necessitate an easement but, rather, an avigation easement is created by low and frequent overflights amounting to a taking of the property.[92] As noted in our discussion of *Causby,* such was not established as to the subject property. These ordinances, which did not create an avigation easement as to the subject property, are in reality height restrictions not amounting to a physical taking. As noted above, the fact that no per se physical taking was established does not end our analysis in this matter.

Regulatory takings

As discussed above, two general takings categories exist: physical and regulatory. Thus, even when government does not physically "take" property, but rather regulates the use of property, the property owner may still be entitled to just compensation if the regulation goes "too far." Two regulatory taking analytical constructs have emerged: categorical regulatory takings, and takings resolved under an ad hoc factual analysis pursuant to *Penn Central.*[93]

A categorical regulatory taking occurs when a regulation deprives land of all economically beneficial or productive use and, as with per se physical takings, the only issue to resolve at trial is damages.[94] Additionally, a

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[92] *See supra* note 6.

[93] 438 U.S. 104.

[94] *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). However, the Court provided that, even if a regulation removes all economic value from property, a compensable taking may

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categorical or per se regulatory taking may occur if the regulation fails to substantially advance a legitimate government interest.[95]

We conclude that no categorical regulatory taking has been shown in this instance. First, the landowners did not allege that the County ordinances deprived them of their property's entire economic value; they conceded below that an economically viable use of their property remains in spite of the height restrictions. Second, the landowners conceded below that the ordinances were a legitimate exercise of the County's police power. Third, it is not clear, without exhaustion of administrative remedies by the landowners, whether and the extent to which the zoning

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not occur if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027; *see also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978) (discussing the three-part ad hoc factual analysis utilized in the absence of a per se physical taking or a categorical regulatory taking).

[95] *Lucas,* 505 U.S. at 1016; *Agins v. Tiburon,* 447 U.S. 255, 260 (1980). *But see Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 732 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment) (expressing no view as to the propriety of the legitimate government interest test); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part) ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments."); *Eastern Enterprises v. Apfel,* 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (suggesting that *Agins'* legitimate government interest test is one more appropriately considered under general due process principles than the Takings Clause). Thus, it is possible that the Court no longer recognizes the legitimate government interest test as viable in the context of a regulatory takings analysis. However, because we do not rest our decision on this test, we need not express our views concerning its continuing validity.

ordinances here have denigrated the economic value of the airspace in question.

Because the landowners did not establish or attempt to assert a categorical regulatory takings case, we must examine the ordinances to determine whether the landowners are entitled to just compensation under the fact-based analysis provided by the United States Supreme Court in *Penn Central.*

The Supreme Court has not provided a "set formula to determine where regulation ends and taking begins."[96] In *Penn Central,* the Court established three guideposts for examination of whether a regulation, that does not deprive the owner of all viable economic use, effects a compensable partial taking: (a) the regulation's economic impact, (b) the regulation's interference with investment-backed expectations, and (c) the character of the government action.[97] All relevant facts are considered on an ad hoc basis. The Court has instructed that, in examining whether a taking has occurred, a reviewing court must consider the property as a whole.[98] Additionally, an allegation that a regulation

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[96] *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962).

[97] *Penn Central,* 438 U.S. at 124.

[98] *Id.* at 130-31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."). Thus, the denominator for takings analysis is the parcel of property as a whole and not portions of property. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331 (2002) (district court erred by disaggregating property into a thirty-two month segment of time from the remainder of the property

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has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking.[99]

While the *Penn Central* ad hoc approach is the proper legal framework for an analysis of whether the landowners in this matter are entitled to compensation, we cannot yet consider the landowners' taking claim, as their case is not yet ripe for review on the merits. We require an actual case or controversy as a predicate to judicial relief.[100] "We will decide only actual controversies, in which the parties are adverse and the issues ripe."[101] An unripe case presents a situation where there is no concrete controversy and an alleged injury is merely speculative.[102]

A regulatory takings claim under *Penn Central* is generally not ripe without a "final decision" regarding the

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owner's fee simple estate and considering whether property owners were deprived of all economically viable use during that period).

[99] *See Euclid v. Ambler Co.*, 272 U.S. 365 (1926) (regulations valid although they effected a seventy-five percent diminution in value of property); *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[100] *Resnick v. Nevada Gaming Commission*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988).

[101] *Boulet v. City of Las Vegas*, 96 Nev. 611, 613, 614 P.2d 8, 9 (1980).

[102] *Resnick*, 104 Nev. at 65-66, 752 P.2d at 232-33.

property owner's ability to develop its property.[103] In *Williamson Planning Comm'n v. Hamilton Bank*, the Supreme Court observed:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.[104]

The final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[105] Accordingly, without a final

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[103] *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190, 195 (1985) (two-part test for ripeness prior to seeking federal relief on a as applied basis: (1) the agency charged with administering the challenged ordinances must have reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has sought compensation through available state procedures); *see also Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002).

[104] 473 U.S. at 190 (citations omitted).

[105] *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S.

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regulatory decision applying the challenged regulation, a court cannot evaluate the economic impact of the regulation with regard to the extent it interferes with reasonable investment-backed expectations and, thus, cannot conduct the *Penn Central* examination without resorting to speculation.[106] A final decision requires, at a minimum, "(1) a rejected development plan, and (2) a denial of a variance."[107] Further, the application for development must be one that is meaningful, *i.e.*, not one that is for "exceedingly grandiose development."[108] Additionally, government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[109]

A limited exception exists to "the final decision [exhaustion] requirement if attempts to comply with that requirement would be futile."[110] However, as one court has explained, a landowner seeking to establish futility carries

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340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.")

[106] *Hamilton Bank*, 473 U.S. at 191.

[107] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, 1455 (9th Cir. 1987) (even if a landowner has submitted development plans and been rejected, an applied regulatory taking case might still not be ripe; a landowner must submit a "meaningful" application for development.); *see MacDonald*, 477 U.S. at 352 n.8, 353 n.9 (the rejection of "exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

[108] *Kinzli*, 818 F.2d at 1455 (the futility exception is not triggered until at least one meaningful application for development is submitted and rejected; "[a] 'meaningful application' does not include a request for 'exceedingly grandiose development") (quoting *MacDonald*, 477 U.S. at 353 n.9).

[109] *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001).

[110] *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988); *see also Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996).

the burden of proving that the exception applies. The landowner must establish that the potential denial of a development permit is more than a mere possibility; rather, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."[111] Thus, for example, in *Lucas,* the Court noted that it would have been futile for the landowner to submit a request for a "special permit" when the regulatory agency stipulated that it would not grant such a permit.[112]

The district court in this case erred by ruling that the futility exception applied and that the landowners were excused from exhausting their administrative remedies. The district court's futility determination was erroneous as a matter of law because the district court (1) placed too much reliance in its futility findings upon the County's ruling on the 1981 variance request by predecessor landowners, a ruling entered some fourteen years prior to the date of valuation in this dispute; (2) failed to consider whether any meaningful alternative for development over and above the existing use in 1995 might be approved through the ordinance variance process;[113] and (3) apparently determined the transition zone surface to be an impenetrable line for development purposes. While the landowners are correct that McCarran opposed the 1981 variance request, they are incorrect in arguing that the denial of the request occurred because of McCarran's opposition. The record of the Board of Commissioner's

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[111] *Gilbert v. City of Cambridge,* 932 F.2d 51, 61 (1st Cir. 1991) (citations omitted).

[112] *Lucas,* 505 U.S. at 1012 n.3.

[113] It appears by implication that the district court believed that if would have been futile to apply for *any* variance.

meeting reveals that the predecessor landowners agreed to height restrictions requested by the airport. The Board, however, apparently denied the variance request because the predecessor landowners refused to pay the moving costs of the mobile home tenants on the property. As noted in the margin, above, the ruling was suggestive of the fact that the County would not override airport recommendations or objections to a project, where the objections were based upon transition-zone restrictions. However, given the total body of evidence on this point, the 1981 rejection by the County does not establish that it would have denied any application for a variance.

We note that the district court did not consider former Aviation Director Broadbent's deposition testimony in making the original futility findings., His deposition was only later used to bolster the landowners' takings argument in support of partial summary judgment and to oppose the County's renewed attack on the ripeness of their claims.[114] As noted, Mr. Broadbent testified that the airport routinely opposed height restriction variances whenever the FAA interpreted a proposed structure as hazardous to aircraft navigation. He could not recall a situation during his tenure at the airport where the Clark County Commission approved an application for a variance or special use permit over an adverse FAA determination.

The district court, in its summary judgment order reciting the landowners' arguments, stated:

> As to the issue of a "variance," it is inapplicable because this is not a regulatory taking so

[114] *See supra* note 33.

> there is no necessity for "finality." Additionally, this Court has already ruled that to make application would be futile especially in light of the fact that the prior owner did make application and was rejected for a 240 foot structure. Additionally, the former Airport Director, Robert Broadbent testified that he would have personally blocked any request for a variance for this property. The County fails to mention that no properties in the Transition Zone have been granted a variance.

The district court's order does not precisely track the equivocal testimony of Mr. Broadbent and was made without the benefit of the subsequent pre-trial offer of proof showing other variances.[115] While one might infer from Mr. Broadbent's statements that McCarran would have opposed any variance application for the property and this opposition would result in a variance denial, the entire context of Mr. Broadbent's testimony suggests that airport opposition to development proposals was tied to FAA objections concerning hazards to air navigation. Also, as noted, the record does not support a conclusion that it would have been futile for the landowners to request a variance. First, the landowners gained a variance in the transition zone for their billboards. Second, evidence from the pre-trial offer of proof found in the record discloses that other property owners have gained variances to construct structures that not only exceed the transition slope, but also extend into the approach zone.[116] Third, Mr.

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[115] *See supra* note 19.

[116] We again note that the information later provided in the County's pre-trial offer of proof was not provided to the district court at the time of its pre-trial rulings on the takings and futility issues. We also note that the district court rejected the offer of proof, ostensibly

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Broadbent testified that he could not remember the County ever going against McCarran's recommendation *if* the airport could show that the FAA supported its recommendation. Fourth, the record indicates that the FAA would have permitted at least some development on the subject property that would penetrate the transition slope.

The FAA responded to the landowners' hypothetical plans, indicating that, while the landowners' proposed structure exceeded the transition slope by 148 feet, it would have no impact on aeronautical operations if lowered by seventy-one feet (*i.e.*, to a height seventy-seven feet into the transition zone). More particularly,

> [i]t should be understood . . . that a penetration of a FAR Part 77 imaginary surface is not reason to determine a structure to be a hazard to air navigation. This is just an indication that further study is required to determine the exact impact the structure would have on aeronautical operations.

Accordingly, the mere fact that a proposed structure may exceed the slope of a height restriction zone is apparently insufficient for the FAA to conclude that the structure will present an aircraft navigation hazard. Thus, the transition zone was, at least ostensibly, permeable through the variance process.[117] However, a determination as to how far a structure could exceed the zone was subject to FAA analysis and a final decision on a variance request by the

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because it had resolved the futility and takings issues. However, the variances noted in the offer of proof support the other evidence in the record undermining the district court's futility and takings rulings, both of which were subject to revision at any time under NRCP 54(b).

[117] *See supra* note 19.

County Commission. In light of the above, we conclude that whether the current Board of County Commissioners would permit a variance remains to be seen.

We also note that the landowners apparently had no concrete plans to develop the assembled parcels to submit for exhaustion of their administrative remedies, here the variance process. Tien Fu Hsu stated he held no formal plans to develop his corporate and non-corporate parcels into a hotel/casino. Lisa Su testified that she did not attempt to develop the property because she lacked the funds to do so, and had no specific plans to develop the property, except in a generalized sense, which she discarded.

It was incumbent upon these landowners to submit a meaningful application for development and resort to the variance process to determine whether, and to what extent, they could penetrate the transition zone. Their failure to do so prevents any analysis as to whether the ordinances went too far in frustrating the investment-backed expectations in assembling the subject parcels, and whether the County would have approved a realistic variant use for the landowners' property. Accordingly, the controversy below was not justiciable because a taking in this case can only be established under a *Penn Central* analysis, and such an analysis cannot be judicially undertaken without a controversy that is ripe for decision. Because the takings issue should have been resolved under *Penn Central,* and because the *Penn Central* issue was not ripe for a decision, the district court erred in not dismissing the action below. However, given the passage of time since the trial, recognizing that the landowners may now be in a position to submit meaningful plans for the further development of the assembled parcels to the FAA and the County, we have determined to reverse and remand this case for further proceedings consistent with

this order. Upon remand, the landowners may, if they so choose, submit meaningful development plans to the County with an application for a variance. If the County denies their application and a "final decision" results, the landowners may bring their case back to district court for adjudication of whether a *Penn Central*-type regulatory taking has occurred through the application of the County ordinances to their property.[118] If an attempt at exhaustion is not made on remand, the district court is instructed to dismiss the matter without prejudice. Based on our conclusion that the landowners' case is not yet ripe for judicial determination, we need not consider the County's remaining arguments, and we dismiss the landowners' cross-appeal as moot.

Finally, in the event the landowners, on remand, exhaust their administrative remedies, the district court must conduct an evidentiary hearing on the takings issue in which any party may introduce a full body of relevant evidence to a regulatory taking. In a regulatory taking case, several formerly excluded facts become relevant in aid of the district court's determination of the takings issue: the landowners' knowledge of the height restrictions when they purchased their property, their development intentions and steps they took to effect these intentions, the feasibility of constructing a viable high-rise hotel/casino, the purchase price of the properties, the variance procedures under the airport zoning ordinances and other County ordinances affecting the property, preexisting height restrictions on the property, and the

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[118] We conclude that any failure on remand to exhaust administrative remedies through a variance process will not constitute an abandonment of the action for the purposes of awarding attorney fees and, costs under NRS 37.180.

FAA's role in the variance process. In the further event that the district court finds a regulatory taking to have occurred, a jury may then determine the question of damages, to wit: the extent to which the reasonable investment-backed expectations have been impaired.[119]

CONCLUSION

The district court erroneously concluded that the County's height-restriction ordinances created a per se physical taking of the landowners' property. Although ordinances like those at issue in this case may potentially give rise to a fact-based regulatory taking, we cannot conclude at this time whether the application of the County's regulations to their property requires just compensation, as this case is not yet ripe for review on the merits. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[120]

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[119] *See supra* note 45.

[120] The Honorable Cliff Young, Senior Justice, was appointed by the court to sit in place of the Honorable Miriam Shearing, Chief Justice. Nev. Const. art. 6, § 19; SCR 10. The Honorable Jerome M. Polaha, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Robert Rose, Justice. Nev. Const. art. 6, § 4.

The Honorable Myron E. Leavitt, Justice, who died in office on January 9, 2004, had voluntarily recused himself from participation in the decision of this matter when it was docketed in this court in November 2001. The Honorable Mark Gibbons, Justice, also voluntarily recused himself from participation in the decision of this matter. Accordingly, this matter was submitted for decision by a five-justice court made up of Justices Agosti, Becker and Maupin, Senior Justice Young and District Judge Polaha.

/s/ Agosti J.
Agosti

/s/ Becker J.
Becker

/s/ Maupin J.
Maupin

/s/ Young Sr.J.
Young

/s/ Polaha D.J.
Polaha

cc: Hon. Stewart L. Bell, District Judge
Clark County District Attorney David J. Roger/
Civil Division
Jones Vargas/Las Vegas
Berger and Norton
Law Offices of Kermitt L. Waters
A. Grant Gerber & Associates
Attorney General Brian Sandoval/Carson City
Attorney General Brian Sandoval/Las Vegas
Beckley Singleton, Chtd./Las Vegas
James S. Burling
Timothy J. Dowling
Foley & Lardner
Chuck R. Gardner
Douglas T. Kendall
Kummer Kaempfer Bonner & Renshaw
Las Vegas City Attorney
Keith L. Lee
Lewis & Roca
Lani L. Williams
Clark County Clerk

DISTRICT COURT

CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subvidision of the State of Nevada, Plaintiff, vs. TIEN FU HSU; et al. Defendants.	CASE NO: A332441 DEPT. NO: VII **DECISION RE: MOTIONS FOR SUMMARY JUDGMENT**
COUNTY OF CLARK, a political subdivision of the State of Nevada, Plaintiff, vs. LISA SU FAMILY TRUST, et al. Defendants.	**DATE: 1/19/01** **TIME: 9:00 A.M.**

DECISION

(Filed Jan. 26, 2001)

The parties filed three Motions for Summary Judgment. The Plaintiff, Clark County ["Plaintiff" or "County"] filed two motions seeking summary judgment and the Defendants, [collectively the "Landowners"] filed a motion which sought summary judgment as to liability only. The Court heard oral argument as to all three motions beginning on January 12, 2001 and concluding on January 19, 2001. The Court now renders this written decision.

Positions of the Parties

Defendants

The Defendants instituted this counterclaim for inverse condemnation of the airspace over their property after the County condemned a portion of the subject property for the widening of Tropicana Avenue. In their Motion for Summary Judgment and in their oppositions to the County's two Motion for Summary Judgment, Defendants contend that their air space was taken without compensation for use by the airport. The County issued Ordinances 728 and 1221 which restricted the height of buildings over the Defendants property. Additionally, and most critically, however, Defendants allege that their property has been included in a "transition zone", which allows the invasion of their air space by air craft. This invasion of the air space renders this taking of the property, a "per se" taking. It is a per se taking because the government took the airspace for its own use. The undisputed testimony of the Airport personnel is that the reason for the height limitations on this property is due to the property's inclusion in a transition zone. The transition zones are zones that are needed by the airport to safely operate and which can be used by airplanes when other methods of approach and departure are blocked or unusable for whatever reason. While the airport personnel cannot say how often this space is invaded, they are clear that the space is necessary and that it is used. Defendants do not challenge the necessity nor the public use of their air space; however, Defendants maintain that this use results in a "taking" under the U.S. and Nevada Constitutions. As such, Defendants are entitled to just compensation for their property.

Defendants deny that this is a regulatory taking in that a regulatory taking involves only restrictions upon the use of one's property but does not allow for physical occupation of that property by another. Once a physical use is permitted, the law regarding regulatory takings is inapplicable. Since planes are allowed into the transition zones, the airspace has been invaded and the taking is per se and not regulatory.

Plaintiff

The Plaintiff has five reasons why it believe that summary judgment should be granted in its favor and why summary judgment should be denied to the Defendants. It should be noted at the start that two of the reasons had previously been ruled on and that the County had not timely requested reconsideration. As such, the rulings made in 1997 are the law of the case and are not to be revisited. These five reasons are as follows:

1. The Landowners have no standing to pursue their claim because they acquired the subject properties after the Ordinances were enacted. The County argues that the vesting in a taking occurs when the condemning agency tales [sic] possession of the Landowners' property. *Argier v. Nevada Power Co.* 114 Nev. 137; 952 P.2d 1390; (1998). The Court ruled that just compensation should be paid to the person who owns the property at the time of the taking. Since the Landowners did not own the property at the time of the ordinance, there is no taking.

2. Landowners do not have any right to the airspace. The County cites NRS § 493.050 and says that ownership is subject to the right of flight. The County insists that

this statute means that there is no right to airspace above the actual height of the building as it is being used.

3. The ordinances are constitutional on their face. Even though the Landowners do not claim any unconstitutionality, for the Landowners to win, the Court must find that the ordinances themselves amount to a taking. The Court must determine if the property has lost all economic use and whether the land use does not represent a legitimate state interest. Basically, the County argues that this is a regulatory taking case and that the test of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) is what the Court should employ. Here the use is legitimate as the use by the airport does constitute a public purpose. The Legislature wanted to use police power as much as possible so as to not pay compensation. The ordinances were a response to that desire. The Landowners' property is still viable. The Landowners want to skip to the fact that its current use is not its highest and best use but that is not the test. The land has economic viability and therefore no taking has occurred. Moreover, there is no interference with a reasonable investment relationship on this property. The County advises that despite the ususal [sic] need for factual inquiries in a regulatory takings case, that in a situation such as this one, where the issues are clear, the Ninth Circuit recently held that this issue may be resolved as a matter of law on a Motion for Summary Judgment. *Buckles v. King* 191 F.3d 1127, 1138-1143 (9th Cir. 1999). Therefore, this Court should grant summary judgment in favor of the County.

4. The claims are not ripe as the Landowners have not been denied the right to build. Since the Landowners have not applied for a variance, they cannot raise any claims. Additionally, the Landowners cannot remove the

airspace from their "bundle of rights". Since they continue to use the property, there is no loss.

5. The properties in question were purchased in the mid 1980's. The property was zoned T-C which had a 35 foot height limit. Today, the property is still zoned T-C with a 35 foot height limit. There was no taking. There was no application for any permit. Claimants had no existing rights to use the airspace above 100 feet.

Landowners' Response

Landowners argue that *Argier* is inapposite because this is not the case of different parties seeking the same condemnation award. Rather, the issue is whether the taking is compensable. In this case, these invisible grids and planes are so intangible that even the County does not know when the air space is being used or when it started. Standing and ripeness are not issues in this case. In any event most of the parcels were owned by related entities. Landowners point out that every jurisdiction except one has held that these airport taking cases are compensable and are per se takings, not regulatory ones. Plaintiff may condemn the airspace; however, it must pay for it. The Landowners also remind the Court that it has already ruled that the date of purchase is not relevant under federal law as the U.S. Supreme Court has allowed subsequent purchasers to bring takings claims. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Nollan v. California Coastal Commission,* 483 U.S. 825; 107 S. Ct. 3141; 97 L. Ed. 2d 677 (1987). As to the issue of a "variance", it is inapplicable because this is not a regulatory taking so there is no necessity for "finality". Additionally, this Court

has already ruled that to make application would be futile especially in light of the fact that the prior owner did make application and was rejected for a 240 foot structure. Additionally, the former Airport Director, Robert Broadbent testified that he would have personally blocked any request for a variance for this property. The County fails to mention that no properties in the Transition Zone have been granted a variance.

The Legislature in NRS § 479.270 has expressly stated that payments be made for the taking of air rights. It is clear that the law acknowledges both the possession of air rights and the compensability thereof.

The Landowners emphasis [sic] that they do not argue that the Ordinances are unconstitutional on their face. Landowners do not argue that the easement is unwarranted or that the taking of the easement is not for public use. Landowners merely seek compensation for the avigation easement which the County is using for its airport operations. There is not a regulatory taking here, there is a physical invasion of the airspace. Not only can the Landowners not build but airplanes are allowed to go into the space. Physical invasion of space is a per se taking and not a regulatory one.

Landowners also note that the Courts have always held that air rights are a separate stick in the bundle of rights. These rights can be adjudicated separately. The U.S. Supreme Court has addressed air rights multiple times. *United States v. Causby,* 328 U.S. 256 (1946) made clear that air space above 500 feet is the public domain and there is no taking but the Court has also made in [sic] clear in *Griggs v. Allegheny County,* 369 U.S. 84 (1962),

that Congress could not take portions under 500 feet of airspace without just compensation.

As to the final argument that there is no taking because the use of the property is still T-C, Landowners point out that if one takes a portion of land, it does not matter if the buildings are still there. Whenever anything is taken, the zoning is not relevant except as to determining the best use of the property in ascertaining damages.

Analysis

The Court has viewed these Motions for Summary Judgment as oppositions to each other. It is clear to the Court that in order to conduct this trial, the issues for the jury must be clearly placed before them. It is also clear that the method of conducting the trial is dependent on whether this is a per se taking or a regulatory taking. Each type of taking has its own rules and procedures. The Motions for Summary Judgment show that each side believes that there is no question of material fact in determining that they should win based on their view of the case. As the County has pointed out, the Ninth Circuit in *Buckles v. King*, *supra*, has stated that the Court can decide the issue of whether there has been a taking on a Motion for Summary Judgment. The Court agrees that it is up to the court to determine whether this is a regulatory taking or per se taking. There is no doubt that the taking cannot be both and therefore, this Court must decide which type of taking has occurred.

As mentioned earlier, certain rulings such as the irrelevancy of the ownership of the property at the time of the enactment of the ordinance and of the futility of making application for variances on this property were

previously decided and are the law of the case. However, the Court will briefly address the *Argiers* issue. In *Argiers* [sic], the condemning authority sought to relieve itself of the duty to pay just compensation because the landowner had sold his property to the county prior to trial on the issue of just compensation. The Nevada Supreme Court defined the issue as follows: "The only issue this court must decide is whether the Argiers' conveyance of their land to Clark County extinguished their right to just compensation." The Nevada Supreme Court held that such a right is not extinguished. In holding that the original landowner held the right, the Court basically held as follows: (1) just compensation is always due when one appropriates property through condemnation; and (2) that between claimants to the same property, the person owning the rights at the time of the taking is entitle to the payment absent actually giving or selling the right to receive the compensation.

It appears to this court, that in *Argiers* [sic], our Supreme Court was setting priorities as between claimants. The references to *United States v. Dow,* 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958) and to *Brooks Investment Co. v. City of Bloomington,* 305 Minn. 305, 232 N.W.2d 911 (Minn. 1975), both refer to priorities between claimants. *Argier* is about the priorities between claimants and not a rule that prevents a condemning agency from paying compensation because there may be other or earlier claimants. Additionally, NRS § 37.115, protects condemning agencies from multiple claimants by bifurcating the procedure and allowing the agency to obtain its judgment of condemnation and then holding a separate proceeding amongst any claimants regarding the allocation of that compensation. To read *Argier* as the County

argues confirms that a condemner need not pay just compensation if there might be disputes as to whom the award should go. It is inconceivable to this court that the Nevada Supreme Court, with its strong belief in due process and with its knowledge of takings law, would hold that a condemner can take property but never have to pay just compensation as long as the original owner was unaware of his rights.

The County argues that Landowners have no air rights above the current use because of NRS § 493.050. NRS § 493.050 states that the flying of aircraft is lawful unless the flight is below the current use of the property. The fact that a flight is lawful is not particularly useful in the context of an inverse condemnation action where the Landowners allege use of the airspace. This statute applies to property not subject to any governmental ordinance. The statute is also about the legality of flight and is meant to forestall trespass actions. The County's argument that there are no air rights are belied both by NRS § 479.270 and by the court's holding in *Penn Central*. The Legislature would not need to allow for the condemnation of air rights if none existed. Neither avigation easements nor § 497.270 would be necessary if there were no air rights. This statute anticipates that air space may need to be condemned. This Court understands that legislative bodies, the Legislature, the County Commission, and the Airport Board, desire to avoid the payment of just compensation to the extent possible by using zoning to achieve the use of the properties. However, NRS § 497.030 is the law. The operative words in this statute are "to the extent legally possible". It is for the courts to determine whether it is legally possible not to pay just compensation.

Penn Central is based on the land owners desire to build a 55 story office building above the historic Penn Central Station. The New York authorities denied the right to build as part of its Landmarks Preservation Laws. The issue itself was whether the air rights could be limited. This presupposes that air rights exist. The Supreme Court decided that air rights could be regulated in certain instances but it did not decide that no rights existed. Therefore, the argument that the Landowners cannot recover because they have no air rights above that which currently covers the existing use is without merit.

The crux of the argument in this case is whether there is a regulatory or per se taking. The County has ably stated the tests to be used in a regulatory taking in *Penn State* [sic] and in *Kelly*. In those cases, the courts found that where a public purpose exists and where the land retains an economic value, then the police power of zoning can be used to avoid the payment of just compensation. In fact, when the police power is properly used, it results in no taking at all. The Landowners do not disagree with the County's view of what the test would be if this were a regulatory taking. But the Landowners argue that use of the air space calls for a different analysis. The analysis is one found in many takings cases including amongst others, *Causby* and *Griggs, supra*. In *Penn Central,* the Court did not overrule *Causby* or *Griggs*. Also, *Nollan* and *Loretto* were both decided after *Penn Central*. In essence, despite *Penn Central,* there are a number of factors which remove certain types of regulations from the *Penn Central* analysis.

In its opinion in *Penn Central,* the Court discusses the types of takings. The final "taking" is as follows:

> "Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." United States v. Causby, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." Id., at 262-263, n.7. See also Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflights held á taking); Portsmouth Co. v. United States, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see YMCA v. United States, 395 U.S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, supra, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964)."

Id. at p. 128.

The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In *Nollan, supra,* the Court points to the fact that not only is the landowner limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property. In

Loretto, the small metal boxes and cable wires/ waves constitute enough of an invasion to property to fall into the *Causby* type takings and require compensation.

Courts have repeatedly held that the government cannot use its legitimate police power to force a Landowner to allow others onto his property without the payment of just compensation. The Plaintiff has not disputed that the Landowners' property is not being used in its transition zone nor has the Plaintiff argued that there is no entry upon the property. The Plaintiff has many legal theories in opposition to the Defendant Landowners' Motion for Summary Judgment, but no factual ones. The Plaintiff has not disputed that aircraft do go through the airspace above the Landowners properties and that the airspace is necessary and used by the airport. In its Motion for Summary Judgment, the Plaintiff argues that it is entitled to regulate the Defendants' land because it is for the public good. In essence the Plaintiff alleges, that the Landowners not only are barred from using the airspace themselves but that the Plaintiff has allowed the airport to make use of the airspace. There is no evidence that the Plaintiff has presented that would dispute that the Landowners' property is used by the airport for the public good nor that would prevent the court from entering summary judgment in favor of the Defendants as to liability. Accordingly, this Court must find that the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants. This results in a "per se" taking that requires just compensation.

CONCLUSION

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." The aim of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). The use of the Defendant's property is indeed for the benefit of the public. Pursuant to the United States and Nevada Constitutions, the Defendants need not bear the burden themselves. The Defendants' Motion for Summary Judgment as to liability is granted. The Plaintiffs two Motions for Summary Judgment are denied. Trial is set to commence on February 26, 2001 at 1:30 p.m. This court finds that the issue of liability and damages as to this condemnation case are inextricably intertwined. Therefore, this case is not appropriate for NRCP 54(b) certification.

IT IS SO ORDERED.

DATED this 26 day of January, 2001.

/s/ Mark Gibons
MARK GIBBONS,
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant/Cross-Respondent, vs. TIEN FU HSU; LISA SU FAMILY TRUST; LISA SU TRUSTEE; PETER B. LIAO; WESTPARK, INC.; LUCKY LAND COMPANY; LUCKY LAND COMPANY INVESTMENTS; LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP; AND WEST PARK COMPANY 1, Respondents/Cross-Appellants.	No. 38853

ORDER DENYING REHEARING

(Filed Dec. 23, 2004)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Agosti, J.
Agosti

/s/ Becker, J.
Becker

/s/ Maupin, J.
Maupin

/s/ Young, Sr.J.
Young

/s/ Polaha, D.J.
Polaha

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(3)

No. 04-1282

Supreme Court, U.S.
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In The
Supreme Court of the United States

TIEN FU HSU, et al.,

Petitioners,

vs.

COUNTY OF CLARK,
a political subdivision of the State of Nevada,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nevada Legislature statutorily declared more than a half-century ago that aviation hazards are a public nuisance and conferred police power authority on Respondent Clark County, Nevada (the "County") to enact airport zoning regulations that prevent their creation and thereby advance the public's health, safety, and general welfare without causing a compensable event. Since 1955, the County has exercised this authority on many occasions by adopting zoning regulations to promote development in which airport, residential, and commercial uses are all compatible. By their plain terms, the County's airport zoning regulations do not authorize aircraft to fly anywhere, do not instruct pilots where to fly, and do not cause either the permanent physical occupation or a lesser physical invasion of any airspace. Simply stated, these regulations do not mandate the public use of private property, but rather are examples of how government traditionally exercises its police power to control land uses in the public interest without incurring any duty to compensate affected property owners.

The question presented to the Nevada Supreme Court therefore was not the question presented by Petitioners to this Court. That question, which the Nevada Supreme Court correctly answered in accordance with this Court's well-settled takings jurisprudence, was the following:

> Whether land use regulations in the form of a height limitation, enacted pursuant to the police power in order to prevent an undisputed threat to public safety, effect a taking when they merely limit the use of private property?

It is this question that is now pending before the Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
REASONS FOR DENYING THE WRIT	9
I. The Petition Advances A Classic Unripe Regulatory Takings Claim That Is Inappropriate For The Court's Review	9
II. Petitioners Fabricate A "Conflict" Among The State Courts That Does Not Exist	10
III. This Matter Involves Traditional Height Limitations Enacted Pursuant To The Police Power And Not A Permanent Physical Invasion Or Occupation	15
A. The County's Airport Zoning Regulations Have Established Traditional Height Limitations Through A Non-Compensable Exercise Of The Police Power – *Penn Central Transportation Co. v. City of New York*	15
B. The Traditional Height Limitations Imposed By The County's Airport Zoning Regulations Are The Functional Equivalent Of A Non-Compensable Setback – *Gorieb v. Fox*	20

TABLE OF CONTENTS – Continued

Page

C. The County's Airport Zoning Regulations Are A Non-Compensable Exercise Of The Police Power To Prevent Public Nuisances – *Keystone Bituminous Coal Association v. DeBenedictis* 21

D. A Per Se Taking Does Not Result Where, As Here, The Government Has Exercised Its Police Power To Protect The Public And Has Not Invited A Permanent Physical Invasion 23

IV. The Court Should Reject Petitioners' Invitation To Revisit *Causby* And *Griggs* Because Its Modern Regulatory Takings Jurisprudence Resolves This Traditional Zoning Matter 25

CONCLUSION 28

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Page

CASES

Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960) 13

Aeronautics Comm'n of Indiana v. State ex rel. Emmis Broad. Corp., 440 N.E.2d 700 (Ind.App. 1982) 12

Agins v. City of Tiburon, 447 U.S. 255 (1980) 16

Baggett v. City of Montgomery, 160 So.2d 6 (Ala. 1964) 11

Brown v. United States, 73 F.3d 1100 (Fed.Cir. 1996) 24, 27

Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1985) 11

City of Austin v. Travis County Landfill Co., 73 S.W.3d 234 (Tex. 2002) 24

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 3

Dolan v. City of Tigard, 512 U.S. 374 (1994) 24, 25

First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal.Rptr. 893 (Cal.App. 1989) 19

Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) 11, 26

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 22

Gorieb v. Fox, 274 U.S. 603 (1927) 4, 20, 21

Griggs v. County of Allegheny, 369 U.S. 84 (1962) 25, 26

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 22

TABLE OF AUTHORITIES – Continued

Page

Hageman v. Bd. of Trustees of Wayne Township, 251 N.E.2d 507 (Ohio App. 1969) 14

Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So.2d 439 (Fla. 1959) 11

Harris v. City of Wichita, 862 F.Supp. 287 (D.Kan. 1994) 16, 25

In re Letourneau, 726 A.2d 31 (Vt. 1998) 20

Indiana Toll Rd. Comm'n v. Jankovich, 193 N.E.2d 237 (Ind. 1963) 13

Jackson Mun. Airport Auth. v. Evans, 191 So.2d 126 (Miss. 1966) 13

Jordan v. Bailey, 944 P.2d 828 (Nev. 1997) 16

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 24

Kentucky Airport Zoning Comm'n v. Kentucky Power Co., 651 S.W.2d 121 (Ky.App. 1983) 14

Kern v. Nevada Ins. Guar. Ass'n, 856 P.2d 1390 (Nev. 1993) 7

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 18, 21, 22, 23

Kimberlin v. City of Topeka, 710 P.2d 682 (Kan. 1985) 11

La Salle Nat'l Bank v. County of Cook, 340 N.E.2d 79 (Ill.App. 1975) 12, 26

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 24, 25

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 9

TABLE OF AUTHORITIES – Continued

Page

Manchester Airport Auth. v. Romano, 412 A.2d 1020 (N.H. 1980) 11

Manigault v. Springs, 199 U.S. 473 (1905) 19

McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) 13

Miller v. Schoene, 276 U.S. 272 (1928) 22

Mugler v. Kansas, 123 U.S. 623 (1887) 22

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 24, 25

Northwest Props. v. Outagamie County, 589 N.W.2d 683 (Wis.App. 1998) 12

Pace v. Bd. of Adjustment, 492 So.2d 412 (Fla.App. 1986) 20

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 10

Patzau v. New Jersey Dep't of Transp., 638 A.2d 866 (N.J. Super. App. Div. 1994) 11

Peacock v. County of Sacramento, 77 Cal.Rptr. 391 (Cal.App. 1969) 15

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 23

Reinman v. City of Little Rock, 237 U.S. 171 (1915) 22

Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964) 13

Rogers v. City of Cheyenne, 490 U.S. 1066 (1989) 12

TABLE OF AUTHORITIES – Continued

Page

Smith v. County of Santa Barbara, 52 Cal.Rptr. 292 (Cal.App. 1966) 15

Sneed v. County of Riverside, 32 Cal.Rptr. 318 (Cal.App. 1963) 15

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) ..... *passim*

United States v. Causby, 328 U.S. 256 (1946) 6, 19, 25, 26

United States v. 48.10 Acres of Land, 144 F.Supp. 258 (S.D.N.Y. 1956) 13

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 19

Village of Willoughby Hills v. Corrigan, 278 N.E.2d 658 (Ohio 1972) 14

Welch v. Swasey, 214 U.S. 91 (1909) 16, 26

Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 10

Yara Eng'g Corp. v. City of Newark, 40 A.2d 559 (N.J. 1945) 11, 13

STATUTES

49 U.S.C. § 40102(a)(32) 2, 18

49 U.S.C. § 40103(a)(1) 2, 18

49 U.S.C. § 40103(a)(2) 2, 18

NRS 493.040 ..... 2, 18

NRS 493.050(1)(a) 2, 18

NRS 497.030(1)(a) 2, 3, 16

NRS 497.030(1)(b) 2, 3

TABLE OF AUTHORITIES – Continued

Page

NRS 497.030(1)(c) 2, 3

NRS 497.040 ..... 2, 3

CODES

Clark County, Nev., Code ch. 20.12 3

ORDINANCES

Ordinance 728, Clark County, Nevada 2, 3, 6

Ordinance 1221, Clark County, Nevada 2, 3, 6

SUPREME COURT RULES

Sup. Ct. R. 10(b) 14

Sup. Ct. R. 14(1)(f) 17

MISCELLANEOUS

Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, Or Police Power Exercises?*, 55 Land Use Law & Zoning Digest (Sept. 2003) 18

Joseph L. Sax, *Takings And The Police Power*, 74 Yale L.J. 36 (1964) 13

Joseph L. Sax, *Takings, Private Property And Public Rights*, 81 Yale L.J. 149 (1971) 14

Rogers v. City of Cheyenne, No. 88-1526, Petition for Writ of Certiorari, *available at* 1989 WL 1174284 (March 16, 1989) 12

JURISDICTION

Petitioners seek to invoke the Court's jurisdiction on two patently erroneous grounds. First, contrary to Petitioners' jurisdictional statement, the County has not adopted regulations that compel them to allow aircraft overflights of their property – the County has adopted traditional zoning height limitations, subject to a variance procedure, that control land uses without requiring or authorizing a physical invasion. Second, contrary to Petitioners' jurisdictional statement, the County did not enact these regulations to promote its own economic interest – the County did so pursuant to its police power to protect the public from the creation of aviation hazards. Given that Petitioners' justifications for a writ of certiorari are invalid, the Court should decline jurisdiction in this matter.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the following relevant constitutional provisions, statutes, and ordinances are reproduced in the Respondent's Appendix ("R.App."):

(1) United States Constitution, Fifth Amendment, at page 1;

(2) United States Constitution, Fourteenth Amendment, § 1, at page 1;

(3) Nevada Constitution, Article I, § 8(6), at pages 1-2;

(4) Nevada Revised Statutes ("NRS") 493.040, 493.050(1)(a), 497.030(1)(a), (b), and (c), and 497.040, at pages 2-3;

(5) 49 U.S.C. § 40102(a)(32), 49 U.S.C. § 40103(a)(1) and (2), at pages 3-4;

(6) Ordinance 728, Clark County, Nevada, at pages 5-22; and

(7) Ordinance 1221, Clark County, Nevada, at page 23-42.

STATEMENT OF THE CASE

The Petition is replete with significant factual errors and omissions. The following is an accurate and complete statement of the case.

Petitioners acquired the approximately 37 acres along Tropicana Avenue in Las Vegas, Nevada that comprise the subject property in 1992. The property is situated across the street from McCarran International Airport ("McCarran") and northwest of the major 19R/1L runway that has been used by jet aircraft since the 1960s and commercial aircraft even longer. Petitioners suggest that the property is the gateway to the "Las Vegas Strip," but it is actually one-half mile to the east and even farther from the hotel-casinos cited by them. *See* RT 2/27/01, at 91:20-22.

Like all other land throughout the County, for fifty years Petitioners' property has been subject to airport zoning regulations, which the County enacted pursuant to its police power statutorily conferred by the Nevada Legislature for the purpose of promoting the public's health, safety, and general welfare by preventing the

creation of aviation hazards. *See* Petitioners' Appendix ("Pet.App.") at 2; NRS 497.030(1)(a), (b), and (c); NRS 497.040. Petitioners mischaracterize the regulations as relating solely to McCarran and serving merely to advance its own economic interests as an airport owner and operator. Petitioners disregard that, in addition to McCarran, the regulations also relate to the federal government's Nellis Air Force Base as well as non-County owned airports. *See* R.App. at 7, 24; Clark County, Nev., Code ch. 20.12.

Petitioners also misconstrue the terms of the County's regulations. *See* R.App. at 5-42. No matter how many times Petitioners erroneously state otherwise, none of these regulations has authorized, invited, directed, or required aircraft to use their airspace or forced its dedication to public use. Aircraft would follow the same flight patterns regardless of whether the County adopted the regulations because they proceed at the direction of federal authorities. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973). The regulations simply establish height limitations and other land use standards to protect the public from aviation hazards. The plain language of the regulations permits no other conclusion. *See* Pet.App. at 37-38. Petitioners apparently labor under the misconception that, if repeated often enough, their misstatements of the scope, purpose, and effect of the regulations will somehow become fact.

Petitioners specifically complain about two of the County's more recent airport zoning enactments – Ordinances 728 and 1221 (adopted in 1981 and 1990, respectively), which they acknowledge were valid exercises of the police power and did not deprive them of all economically viable use of the property. *See* Pet.App. at 3, 6-8, 39;

R.App. at 55, 70. These regulations placed all property within the County into at least one of four zones (runway approach, transition, horizontal, and conical) according to its relationship to the end of a runway. The height limitations were most burdensome within the runway approach zone and least burdensome within the conical zone. None of Petitioners' property lies within a runway approach zone. *See* Pet.App. at 2-3, 6.

Since 1974, at least a portion of Petitioners' property has been within the transition zone for McCarran's 19R/1L runway, which is adjacent to the runway approach zone. *See* Pet.App. at 3. Petitioners incorrectly suggest that the County intentionally expanded the transition zone to include more of the property in order to provide "extra maneuvering room" for certain aircraft. *See* Petition ("Pet.") at 6. The County never made such a determination. Instead, subsequently enacted regulations of general applicability, coupled with expansion of the 19R/1L runway, placed more of the property within that zone. *See* Pet.App. at 6.

Rather than the runaway truck ramp described by Petitioners, the transition zone is the functional equivalent of a setback, which this Court has long recognized government may impose through the non-compensable exercise of its police power to address public safety and other concerns. *See Gorieb v. Fox*, 274 U.S. 603 (1927). Transition zone height limitations range from 35 to 150 feet. *See* Pet.App. at 3, 4, 6; R.App. at 17-18, 34-35. The property's location within the transition zone did not subject it to height limitations that were more restrictive than the 35-foot limitation established by its primary zoning for trailer court use, did not impair its existing

uses, and did not require Petitioners to relocate. *See* Pet.App. at 6, 32; R.App. 18-19, 39.

Petitioners' assertion that the County's regulations have reduced their property to "uses like warehouse, cemetery, or golf course" is false. *See* Pet. at 6-7. The property indisputably has more significant economically viable uses. When Petitioners acquired the property, trailer court and lounge businesses were being operated there. *See* Pet.App. at 11. Petitioners have continued these uses and started a billboard business that they also still conduct. *See id.* at 7. While these businesses annually generate substantial revenue for them, Petitioners never intended, planned, or otherwise pursued development for more lucrative uses. *See id.* at 11, 48. Evidence confirms, however, that Petitioners could construct a building to a height of at least 240 feet under current airport zoning standards without causing an aviation hazard. *See id.* at 9-10.

Petitioners mistakenly assume that the imaginary transition surface imposed an impenetrable ceiling on their property's vertical development. Petitioners overlook the procedure, created by the County's regulations, which authorizes variances from height limitations that would preclude nonconforming future uses. *See* R.App. at 19-20, 39-41. The regulations therefore do not bar penetrations of the transition zone, but rather serve to trigger an analysis by the Federal Aviation Administration ("FAA") as to whether a development plan would constitute an aviation hazard. *See id.* at 35-41; Pet.App. at 18. When the FAA determines that a plan would not pose such a hazard, the County generally authorizes the development regardless of the height limitations. The County has granted such

variances for properties located in the transition and other zones. *See* Pet.App. at 10, 46-47.

Because Petitioners have not submitted a meaningful development plan or variance application, the County necessarily has never denied their use of any airspace. *See* Pet.App. at 22-23. Petitioners' assertion that the County has "prohibited" them from using 60 percent of their useable airspace therefore is untrue. *See* Pet. at 5. Until Petitioners apply and receive a final decision from the County, no one will ever know how much of the airspace is available for use.

Despite their failure to apply, Petitioners alleged that the height limitations imposed by Ordinances 728 and 1221 had taken their airspace. *See* R.App. at 55, 70. Prior to trial, the trial court granted Petitioners' summary judgment motion and held the County liable for a per se physical taking of the airspace as a matter of law. *See* Pet.App. at 52-64. No evidence was proffered that even one aircraft had traversed the airspace, but the trial court concluded that the County had effected the type of physical taking recognized in *United States v. Causby*, 328 U.S. 256 (1946), based on unsubstantiated findings that aircraft "go through the airspace" and that the airspace "is necessary and used by the airport."[1] *See* Pet.App. at 61-64. In the process, the trial court misconstrued the plain language of the County's regulations and applicable takings law.

The trial court also made erroneous evidentiary rulings, ignored in the Petition, which affected the conduct

[1] Petitioners previously dismissed their takings claim based on the effects of aircraft overflights. *See* Pet.App. at 8, 31.

and outcome of the trial that was held solely on the issue of compensation. Significantly, the trial court excluded evidence of preexisting airport zoning height limitations and the zoning procedures relevant to the development of Petitioners' property, including evidence relating to the available variance procedure. *See* Pet.App. at 18. The trial court required the County's expert appraiser to value the property in the "before condition" (i.e., before the taking mistakenly found) using the invalid hypothetical assumption that there were no height limitations of any kind that impacted land use. *See id.* at 18, 19. Petitioners overlook that opinions expressed by the County's expert appraiser on value and other issues were the result of these trial court errors. *See id.* at 19, 49-50; Pet. at 7.

Petitioners cite various legal conclusions and factual findings made by the trial court in entering summary judgment on the issue of liability, but these determinations were subject to de novo review under state law. *See Kern v. Nevada Ins. Guar. Ass'n*, 856 P.2d 1390, 1392 (Nev. 1993). During that review, the Nevada Supreme Court found that virtually all of the trial court's legal and factual conclusions were wrong, including the ones relied on by Petitioners.[2]

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[2] The Nevada Supreme Court determined, for example, that the trial court should have held that the testimony of the County's aviation expert relied on by Petitioners did not establish a physical invasion or occupation, that the airport zoning regulations did not create an avigation easement because they merely established height limitations, that there had not been a deprivation of air rights because no meaningful development plan or variance application had ever been submitted, and that evidence of preexisting height limitations and zoning procedures was admissible. *See* Pet.App. at 31-32, 37-38, 41-50.

The Nevada Supreme Court rectified these errors by rejecting Petitioners' per se physical takings theory as incompatible with governing law, finding that the regulatory takings principles promulgated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), provided the controlling authority for the resolution of this matter, and concluding that Petitioners' claim was not ripe for adjudication. *See* Pet.App. at 40-50. Even though the Nevada Supreme Court acted in accordance with well-settled takings jurisprudence, Petitioners have sought review by this Court.

SUMMARY OF ARGUMENT

Because they have no viable legal or factual basis on which to request a writ of certiorari, Petitioners resort to misconstructions of law and misstatements of fact in an attempt to convince the Court that this matter is worthy of its attention. Not only do the mischaracterizations that permeate the Petition portray a fictional case that is unsuitable for this Court's consideration, review is unjustified even under the real circumstances of this case.

At issue here is whether a traditional zoning height limitation enacted pursuant to the police power has effected a taking. This common issue is resolved, as the Nevada Supreme Court determined, by reference to established ripeness and regulatory takings principles that confirm there has been no taking.

Petitioners are essentially asking this Court to overrule *Penn Central*, 438 U.S. at 104, and adopt a new category of per se takings rules that eviscerate the police power. The Court should summarily reject this request as

unnecessary, inappropriate, and against public policy. The decision of every state court of last resort that has considered the question presented during the past twenty years validates the Nevada Supreme Court's holding. Contrary to the Petitioners' assertions, no conflict exists that requires resolution by the Court. Per se takings principles have no application to this ordinary land use regulation case where there has been no government-mandated physical invasion. The Petition therefore should be denied in its entirety.

REASONS FOR DENYING THE WRIT

I. The Petition Advances A Classic Unripe Regulatory Takings Claim That Is Inappropriate For The Court's Review

Petitioners never submitted even one meaningful development plan or invoked the variance procedure available under the County's airport zoning regulations. Instead, Petitioners erroneously assumed that the regulations prohibited penetrations of the imaginary transition surface and, on this basis, asserted a taking of the airspace above that surface. This failure to apply, which was not futile as the Nevada Supreme Court determined, made Petitioners' takings claim unripe for adjudication. *See* Pet.App. at 22-23, 41-49; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986). Ripeness is lacking when the possibility remains "open" that development will be permitted, as it does here given that the County has discretion to approve any proposal and the evidence established that Petitioners could build a structure to a height of at least 240 feet. *See* Pet. at 9-10; *MacDonald*, 477 U.S. at 352-53.

No justiciable controversy exists regarding the application of the County's regulations to Petitioners' property. A final decision on the nature and extent of land uses permitted by a challenged regulation is required before jurisdiction exists to adjudicate a takings claim. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-40 (2002). In other words, "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). There is no final decision for ripeness purposes without at least a rejected development plan and variance application. *See id.*; *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-89 (1985).

No court can ascertain whether the County's regulations have "gone too far," and thereby effected the taking claimed, because it is speculative as to whether they will ultimately prevent Petitioners from developing their property in any way. The Petition accordingly is inappropriate for consideration on its merits.

II. Petitioners Fabricate A "Conflict" Among The State Courts That Does Not Exist

There is no conflict of any kind among state courts as to whether airport zoning height regulations effect a per se physical taking of property. Like the Nevada Supreme Court, every state court of last resort that has considered this issue during the past twenty years has found that such regulations, which limit building heights without requiring the public use of private property, constitute valid, non-compensable exercises of the police power.

It is unmistakable that this Court's opinion in *Penn Central*, which began the modern era of takings jurisprudence, is the reason for this uniformity of state court decisions. *Penn Central* instructs that when government has allegedly deprived landowners of the beneficial use of their air rights, as Petitioners contend has occurred here, a regulatory approach characterized by "essentially ad hoc, factual inquiries," rather than the application of per se rules, provides the proper analytical framework for determining takings liability. *See Penn Central*, 438 U.S. at 107, 124, 138. The Nevada Supreme Court recognized that *Penn Central* controlled and therefore appropriately chose to align itself with the other modern state courts, as well as several earlier state courts, that have considered this issue.[3] *See* Pet.App. at 36-37, 40.

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[3] *See infra* note 8 and accompanying text; *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 666 (Iowa 1992) (no taking where property lost market value, but still had economically viable uses, because of airport height regulations), *cert. denied*, 508 U.S. 911 (1993); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 721-26 (Wyo. 1985) (airport height regulations adopted to avert the creation of aviation hazards did not take an airspace easement), *appeal dismissed*, 476 U.S. 1110 (1986); *Kimberlin v. City of Topeka*, 710 P.2d 682, 687-88 (Kan. 1985) (zoning ordinance establishing height and use restrictions to promote airport safety was a non-compensable exercise of the police power); *Manchester Airport Auth. v. Romano*, 412 A.2d 1020, 1021 (N.H. 1980) (whether airport zoning regulations effected a taking was ascertained through a factual analysis rather than as a matter of law); *Baggett v. City of Montgomery*, 160 So.2d 6, 7-10 (Ala. 1964) (zoning ordinance imposing height limitations near an airport to protect against aviation hazards was valid); *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So.2d 439, 444-45 (Fla. 1959) (regulating heights near airports was a valid exercise of the police power that promoted orderly development, the stabilization of land values, and public safety); *Patzau v. New Jersey Dep't of Transp.*, 638 A.2d 866, 870-72 (N.J. Super. App. Div. 1994) (controlling land use near an airport is not a taking; distinguishing *Yara Eng'g Corp. v. City of Newark*, 40 A.2d 559 (N.J. 1945),

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Petitioners primarily rely, by contrast, on outdated, pre-*Penn Central* state court decisions that have no applicability.[4] Unlike this case, Petitioners' authorities involve property located in airport approach zones, property subject to ongoing aircraft overflights (no evidence exists of even one overflight here), property that sustained harm to its existing uses, or property that lost all economically viable use and value. Petitioners' authorities also do not broadly hold that all airport zoning height regulations permit the physical invasion of airspace, as Petitioners inaccurately suggest, but rather have outcomes that are specific to and determined by their facts, which are markedly different than the facts of this case. Even the most

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which Petitioners rely on here, because the regulation deprived the property located within the airport approach and turning zones of all value), *cert. denied*, 649 A.2d 1288 (N.J. 1994); *La Salle Nat'l Bank v. County of Cook*, 340 N.E.2d 79, 89 (Ill.App. 1975) (airport height regulations did not take private property for public use; "the need to protect the public from air hazards is a proper exercise of police power"); *see also Northwest Props. v. Outagamie County*, 589 N.W.2d 683, 686-87 (Wis.App. 1998) (ordinance that protected aerial approaches to an airport by "regulating, restricting and determining the use, location, height, number of stories and size of buildings and structures and objects of natural growth in the [airport's] vicinity" was constitutional), *review denied*, 590 N.W.2d 490 (Wis. 1999); *Aeronautics Comm'n of Indiana v. State ex rel. Emmis Broad. Corp.*, 440 N.E.2d 700, 704, 706 (Ind.App. 1982) (regulating structural heights near airports to "protect the safety and welfare of persons and property in the air and on the ground by ensuring the navigable air space overlying the state is maintained in an unobstructed condition" was valid). Modern case law makes clear that there is no taking regardless of the zone in which property is located because airport zoning height limitations are a non-compensable exercise of the police power.

[4] In *Rogers v. City of Cheyenne*, 490 U.S. 1066 (1989) (mem.), the Court denied a petition for a writ of certiorari where the petitioner purported to show the same state court conflict while presenting essentially the same question for review. The petition is available at 1989 WL 1174284.

cursory review of these cases reveals that their holdings are not as Petitioners represent.[5]

The only two state court cases referenced by Petitioners that were issued since *Penn Central* are equally unavailing to their cause. Petitioners cite just one post-*Penn Central* opinion issued by a state court of last resort which is factually inapposite and remarkable solely because the government enterprise theory of takings liability recognized there has never been adopted elsewhere in airport zoning cases and has long since been repudiated by its primary proponent.[6] The other post-*Penn*

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[5] *See infra* notes 6 through 9 and accompanying text; *Indiana Toll Rd. Comm'n v. Jankovich*, 193 N.E.2d 237 (Ind. 1963) (a taking where a toll road had been constructed "in such a manner as to cross the inner area approach zone" of a runway; the maximum structural height permitted on the property was 18.5 feet and the toll road penetrated the approach zone by 6.5 feet), *cert. dismissed*, 379 U.S. 487 (1965); *Jackson Mun. Airport Auth. v. Evans*, 191 So.2d 126 (Miss. 1966) (a taking where government demanded the topping or removal of trees that grew within an airport approach zone because they were an obstruction); *Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964) (a taking where zoning to protect a runway approach limited portions of land to agricultural uses); *Yara Eng'g Corp. v. City of Newark*, 40 A.2d 559 (N.J. 1945) (a taking where zoning, which the state legislature had not authorized, restricted development and left land with nominal value); *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960) (a taking based on continuing and frequent low overflights); *see also United States v. 48.10 Acres of Land*, 144 F.Supp. 258 (S.D.N.Y. 1956) (direct condemnation of avigation easement where glide angle plane passed over land).

[6] In that case, *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), the Minnesota Supreme Court found a taking based on a government enterprise theory of liability where regulations substantially limited development beneath the airport approach by prohibiting above-ground structural uses on a portion of the land and by imposing significant height, density, and use restrictions on the remainder of the land. This theory has its origins in an article published over forty years ago. *See* Joseph L. Sax, *Takings And The Police Power*, 74 Yale L.J. 36 (1964). Soon thereafter, the author acknowledged that this theory is

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Central opinion cited by Petitioners, which is also uninformative as a result of its unrelated facts, is inconsequential because it is merely the decision of an intermediate state appellate court.[7] *See* Sup. Ct. R. 10(b).

Petitioners' misplaced reliance on the decisions of other intermediate state appellate courts confirms the absence of a state court conflict in two additional ways. First, Petitioners cite a factually distinguishable opinion of an intermediate Ohio appellate court while ignoring a later Ohio Supreme Court holding that airport zoning height limitations were a constitutional exercise of the police power that did not result in a taking.[8] Second, Petitioners cite two factually distinguishable opinions of intermediate California appellate courts while disregarding that another such court found that airport zoning

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inapplicable to takings claims like the one asserted by Petitioners. *See* Joseph L. Sax, *Takings, Private Property And Public Rights*, 81 Yale L.J. 149, 150-151 & n.5, 161-167 (1971).

[7] *Kentucky Airport Zoning Comm'n v. Kentucky Power Co.*, 651 S.W.2d 121 (Ky.App. 1983) (a taking where a power company was ordered to mark and relocate electric power lines, which preexisted the nearby airports, for purposes of aviation safety).

[8] *Compare Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972) (denying a takings claim by the owners of land located within a transition zone that was subject to a 70-foot height limitation while rejecting the notion that government could only achieve the purposes of airport zoning through its eminent domain powers), *cert. denied*, 409 U.S. 919 (1972), *with Hageman v. Bd. of Trustees of Wayne Township*, 251 N.E.2d 507 (Ohio App. 1969) (a taking where zoning established a corridor for use by military aircraft during takeoff and landing and regulated building heights, population density, and lighting within the corridor).

regulations did not effect a taking.[9] Thus, like Petitioners' other authorities, these cases establish no conflict.

Petitioners' mischaracterization of the state of the law to suggest that a conflict exists among the state courts of last resort is unavailing. There is no conflict. Consequently, the Court has no reason to review this matter.

III. This Matter Involves Traditional Height Limitations Enacted Pursuant To The Police Power And Not A Permanent Physical Invasion Or Occupation.

A. The County's Airport Zoning Regulations Have Established Traditional Height Limitations Through A Non-Compensable Exercise Of The Police Power – *Penn Central Transportation Co. v. City of New York*

The Petitioners' fundamental erroneous premise is that the County's regulations authorize aircraft to invade their airspace or reserve it for public use. By their plain terms, the County's regulations do nothing more than control land use through height limitations and other standards to prevent the creation of aviation hazards,

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[9] *Compare Peacock v. County of Sacramento*, 77 Cal.Rptr. 391 (Cal.App. 1969) (a taking where the subject land "had no practical value or beneficial use" after its development had been frozen by government regulation), *and Sneed v. County of Riverside*, 32 Cal.Rptr. 318 (Cal.App. 1963) (holding, without resolving the issue of liability, that the complaint stated a claim for the taking of an avigation easement within the glide angle of clear and approach zones and where frequent low overflights had been alleged), both cited by Petitioners, *with Smith v. County of Santa Barbara*, 52 Cal.Rptr. 292 (Cal.App. 1966) (no taking where police power regulation rezoned land near an airport from its purported highest and best use to an allegedly less valuable use).

which the Nevada Legislature long ago declared are public nuisances. *See* R.App. at 5-42; NRS 497.030(1)(a); *see also Harris v. City of Wichita*, 862 F.Supp. 287, 289-291 (D.Kan. 1994) (airport zoning regulations did not authorize aircraft overflights, and therefore did not cause a physical invasion or per se taking, but rather restricted land uses to reduce risks to the public), *aff'd*, 74 F.3d 1249 (10th Cir. 1996). No provision of the regulations compels Petitioners to accept a physical invasion or occupation. The regulations are like any other ordinary land use planning tool, employed in the public interest through the police power, that does not result in a compensable taking.[10] *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980).

Petitioners are trying to negate the plain terms of the regulations, which defeat their Petition, by characterizing them as though they have imposed a servitude on their property. Such an effort was rejected in *Penn Central*, where the Court pointed out that cases like *Welch v. Swasey*, 214 U.S. 91 (1909), which held that height limitations are not takings, "illustrate the fallacy [of the] contention that a 'taking' must be found to have occurred

[10] Petitioners misleadingly and incorrectly suggest that the County conceded using their airspace when it argued in the courts below that their claim failed under a prescriptive easement theory. The County never stated or implied that there was any evidence of a physical invasion of the airspace. None exists in the record. This argument served to demonstrate that Petitioners' takings claim was not merely unfounded – it also was not timely alleged because the prescriptive period is five years. *See Jordan v. Bailey*, 944 P.2d 828, 832 (Nev. 1997). The regulations relied on by Petitioners took effect more than five years before they alleged their claim, meaning that the prescriptive period had already expired under their erroneous theory that the County had mandated a public "use" of their airspace. Thus, when considered in the proper context, the County's argument reinforces the Petition's lack of merit.

whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *See Penn Central*, 438 U.S. at 130 n.27. *Penn Central* confirmed that government may regulate airspace, such as through zoning limitations on vertical development, without compensation. *See id.* at 107, 124, 138. That is precisely what the County has done here, as the Nevada Supreme Court recognized.

Petitioners cannot cite any provision of the County's regulations that authorizes aircraft to invade their airspace or reserves such airspace for public use. Conspicuously absent from the Petition is any discussion of the terms that purportedly grant such authorization or make such a reservation. Petitioners also have not provided the Court with the text of the regulations. *See* Sup. Ct. R. 14(1)(f). These omissions are not surprising because the regulations do not support Petitioners' proposition. *See* R.App. at 5-42.

Penn Central disposes of the Petition because the landmark preservation law at issue there had the same effect as the County's regulations in dispute here – limiting the private use of certain airspace in the public interest while permitting gainful use of the remainder of the property, including the unimpaired continuation of existing economically viable uses. *See Penn Central*, 438 U.S. at 135. Compensation is unavailable even when regulatory limitations deprive property of its most beneficial use. *See id.* at 125. Hence, the County's regulations are, like the law examined in *Penn Central*, traditional regulatory

limitations on land use that do not constitute a taking.[11] Even further undermining the Petition is that the extent of the limitation is unknown here, making the takings claims unripe, because Petitioners never submitted a meaningful development plan.

Petitioners disregard that, according to *Penn Central*, air rights are not a separate segment of property for takings purposes. *See Penn Central*, 438 U.S. at 130. Rather, the "parcel as a whole" is the relevant property interest. *See id.* at 130-31; *Tahoe-Sierra*, 535 U.S. at 326-27. Land use regulations may "place limits on the property owner's right to make profitable use of some segments of his property," including the airspace, without causing a compensable event. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-98, 500 (1987). The effect of the regulations challenged here is no different.[12]

Petitioners' suggestion that a separate constitutional standard governs height limitations that prevent the

[11] Petitioners attempt to bolster their erroneous takings theory by misrepresenting, through selective citations, the analysis set forth in a recent article about this case by a leading takings law scholar, Jan G. Laitos, which was published before the Nevada Supreme Court's decision. *See* Pet. at 4, 18. Professor Laitos emphatically concluded that Petitioners' legal theory is wrong, stating that "a *per se* physical invasion approach should not be used to test the takings validity of the Clark County height restriction." *See* Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?*, 55 Land Use Law & Zoning Digest 7 (Sept. 2003). According to Professor Laitos, the "*Penn Central* default rule" provides "the correct analysis for a reviewing court to use in a case involving a height restriction near an airport runway, as in the Nevada case." *See id.*

[12] Petitioners also disregard that their property rights are limited by a state statutory right of flight, [*see* NRS 493.040 and 493.050(1)(a)], and the federal navigational servitude. *See* 49 U.S.C. § 40102(a)(32); 49 U.S.C. § 40103(a)(1) and (2).

creation of aviation hazards is without merit. The non-compensable exercise of the police power is essential "to protect the lives, health, morals, comfort and general welfare of the people." *See Manigault v. Springs*, 199 U.S. 473, 480 (1905). The County exercised this authority in pursuit of the "highest of public interests – the prevention of death and injury." *See First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal.Rptr. 893, 904 (Cal.App. 1989), *cert. denied*, 493 U.S. 1056 (1990). This Court even observed as early as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), that government may regulate building heights to minimize dangers to the public.

Air travel is now an integral part of the modern world, as pointed out in *Causby*, 328 U.S. at 260-61, and it would be incongruous for per se takings liability to result where government acts to protect the public from related hazards when, as in *Penn Central* and countless other cases, "lesser public interests have been deemed sufficient to justify zoning which diminishes – without compensation – the value of individual properties." *See First English*, 258 Cal.Rptr. at 904. Height limitations imposed for such a purpose are at least the constitutional equivalent of, and therefore warrant the same treatment as, height limitations commonly imposed without compensation to facilitate orderly community development.

The general rule is that a government regulation that "forbids the private use of certain airspace *does not* constitute a categorical taking." *See Tahoe-Sierra*, 535 U.S. at 323 (emphasis added; citation omitted). That rule, which governs here, precludes the Petitioners' novel per se takings theory and mandates the denial of their Petition.

B. The Traditional Height Limitations Imposed By The County's Airport Zoning Regulations Are The Functional Equivalent Of A Non-Compensable Setback – *Gorieb v. Fox*

The constitutionality of setbacks for land use planning is indisputable. In *Gorieb*, 274 U.S. at 603, the Court affirmed the government's use of its police power to require a building setback as a development condition without compensation. The Court recognized that traditional horizontal setbacks promote the public's health, safety, and general welfare by, among other things, establishing a buffer zone between public roadways and private buildings to facilitate the safe operation of motor vehicles. *See id.* at 609. Other courts have made similar observations. *See, e.g., In re Letourneau*, 726 A.2d 31, 35 (Vt. 1998); *Pace v. Bd. of Adjustment*, 492 So.2d 412, 415 (Fla.App. 1986), *review denied*, 501 So.2d 1283 (Fla. 1987).

The height limitations established by the County's regulations serve this identical purpose. The regulations do not merely advance aesthetic goals, which *Gorieb* makes clear is sufficient to preclude takings liability. *See Gorieb*, 274 U.S. at 608-10. Rather, the regulations promote the more important objective of minimizing the public's risk of bodily harm and property damage by creating a safety buffer zone between designated flight paths and structures on the ground. The regulations therefore function exactly like a horizontal setback. Neither invites nor directs the public use of private property. The only difference between them, which has no legal significance, is that the regulations are applied vertically in the sky. Because these horizontal and vertical setbacks are functionally indistinguishable, the same constitutional

standards must apply to both. *Gorieb* dictates that the County's vertical setback requirements are a non-compensable exercise of the police power.

C. The County's Airport Zoning Regulations Are A Non-Compensable Exercise Of The Police Power To Prevent Public Nuisances – *Keystone Bituminous Coal Association v. DeBenedictis*

Takings liability traditionally does not result when government limits private property rights to protect against the establishment of a public nuisance. Directly on point is *Keystone*, 480 U.S. at 470, because the County's regulations are identical in their effect and purpose to the subsidence act considered there.

Both *Keystone* and this case involve regulatory limitations on the use of private property to protect the public. At issue in *Keystone* was a state law that required mine owners to leave a certain amount of underground coal in place in order to safeguard the public by preventing subsidence that could significantly damage the property rights of surface owners. *See id.* at 474-75. Similarly, in this case, the County's regulations require landowners to leave a certain amount of airspace vacant in order to safeguard the public by preventing aviation hazards that could result in substantial bodily injury and property damage. Because of these striking parallels, the constitutional analysis undertaken in *Keystone* is mandated here.

Rejecting the notion that the subsidence act had physically appropriated private property, *Keystone* recognized that the relevant inquiry was whether there had been a regulatory taking. *See Keystone*, 480 U.S. at 488

n.18. The Court conducted a *Penn Central* analysis and found no taking even though the challenged law, like the County's regulations here, precluded one owner (the underground coal owner) from using a portion of its property (the coal) in order to benefit the property interests of another owner (the surface land owner). *See id.* at 501-02.

According to *Keystone*, no taking results where, as in this case, the government limits private land uses that have the potential to cause public harm even when they are not intrinsically noxious or unreasonable. *See id.* at 485-93. The rationale underlying this rule is that "'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community' and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *See id.* at 491 (quoting *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)).

Although *Keystone* is the most pertinent example, the Court has a long history of upholding regulations that limit or destroy real property rights while protecting against public nuisances. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Mugler*, 123 U.S. at 623. Like *Keystone*, these cases recognize that all landowners, including Petitioners, have no property right to establish a public nuisance.

Ignoring this inherent limitation on their property rights, Petitioners have asserted the same type of claim alleged in *Keystone*, arguing that the County's regulatory action has restricted the use of one segment of their

property – airspace – for the public benefit of facilitating safe air travel. *Keystone* confirms that such a claim is inappropriate for per se rules, but rather requires evaluation under the multifactor *Penn Central* approach. The per se physical takings theory advanced by Petitioners therefore has no merit.

D. A Per Se Taking Does Not Result Where, As Here, The Government Has Exercised Its Police Power To Protect The Public And Has Not Invited A Permanent Physical Invasion

The per se takings doctrine is inapplicable when government exercised its police power, as the County did in this case, to regulate private land uses that posed a public safety hazard. Per se takings liability is inappropriate under these circumstances because government cannot afford to regulate by purchase on matters of such public importance. *See Tahoe-Sierra*, 535 U.S. at 335. This fundamental principle has been the cornerstone of the Court's takings jurisprudence for nearly a century. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The key prerequisite to a per se physical taking – the government's invitation to the public to invade and permanently occupy private property – is absent here. The County's regulations impose height limitations and other standards to prevent the creation of aviation hazards. Nothing more. None of their provisions invites aircraft to invade any airspace.

For this reason, the per se physical takings cases relied on by Petitioners are inapposite. *See* Pet. at 17-18. The controls on land use imposed by the County are in no

way analogous to circumstances in which government compelled private property owners to: (1) acquiesce in the public's use of a private marina, as in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); (2) permit a cable television company to affix its facilities to a private building, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (3) grant an easement across private land for beach access by the public when such action would not ameliorate problems anticipated by the proposed redevelopment, as in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); or (4) convey a pedestrian/bicycle pathway as a condition for permitting private store expansion when the dedication would not rectify any problem created by the modified land use, as in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Significantly, in each of these cases, government intended for and invited the public to invade private property on a permanent basis.

That is not the situation in this case, however, where the County's intent is that aircraft remain on their designated flight paths and never use the safety buffer zone established by its regulations.[13] It therefore is not surprising that none of the per se physical takings cases cited by Petitioners considered the question presented to the Nevada Supreme Court, which is whether land use regulations enacted pursuant to the police power result in a

[13] Even if an unintended use of private airspace occurs, which would be unrelated to the County's regulations under any circumstances, it would not amount to a per se physical taking. In general, "unlike a government invasion of the surface land itself, an invasion of airspace above surface land does not *per se* constitute a taking." *See Brown v. United States*, 73 F.3d 1100, 1104 (Fed.Cir. 1996); *City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex.), *cert. denied*, 537 U.S. 950 (2002).

taking when they preclude the use of private property in a manner detrimental to the public's health, safety, or general welfare.

Petitioners' charge that the Nevada Supreme Court fell into a "label affixation trap" is misplaced. *See* Pet. at 16. Ironically, it is Petitioners who have fallen into that trap. The facts of this case simply do not support the application of the per se takings principles proposed by them. *See Harris*, 862 F.Supp. at 291, 293-94 (*Loretto*, *Nollan*, and *Dolan* are irrelevant to whether airport zoning regulations effect a taking).

Recognizing that the *Penn Central* approach governs here, the Nevada Supreme Court obeyed this Court's instructions and rejected Petitioners' request that it indiscriminately expand the per se takings doctrine to this obvious regulatory case. *See Tahoe-Sierra*, 535 U.S. at 342 ("the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule").

IV. The Court Should Reject Petitioners' Invitation To Revisit *Causby* And *Griggs* Because Its Modern Regulatory Takings Jurisprudence Resolves This Traditional Zoning Matter

This case is not the appropriate vehicle by which to reexamine the physical takings principles promulgated in *Causby*, 328 U.S. at 256, and *Griggs v. County of Allegheny*, 369 U.S. 84 (1962). Neither *Causby* nor *Griggs* considered the question addressed by the Nevada Supreme Court – whether a zoning height limitation imposed to protect the public from the creation of aviation hazards is

a non-compensable exercise of the police power or a taking without compensation. Petitioners even concede this point. *See* Pet. at 23.

Both *Causby* and *Griggs* instead involved the extraordinary situation in which aircraft overflights were so low and so frequent that their effects destroyed the existing uses of the land below.[14] Not only are such rare circumstances absent here, where existing land uses remain intact and other substantial economically viable uses are available, there is no evidence of even one overflight of the subject property. In other words, as the Nevada Supreme Court determined, *Causby* and *Griggs* are inapposite to this traditional height limitation case where overflights are not at issue.

Petitioners are mistaken in suggesting that the County has evaded a duty imposed by *Causby* and *Griggs*, [pet. at 24] – "Neither Griggs nor Causby assist directly in determining whether zoning ordinances promulgated pursuant to statutory authority can 'take' in the same manner." *See La Salle Nat'l Bank*, 340 N.E.2d at 88. Petitioners ignore that this Court has held before and since *Causby* and *Griggs* that regulations limiting vertical development, like the County's regulations, do not effect a taking. *See Penn Central*, 438 U.S. at 107, 124, 138; *Welch*, 214 U.S. at 107. Petitioners' misunderstanding of this principle is exemplified by their misguided notion that a Federal Circuit opinion in an inapposite aircraft overflight

[14] Petitioners' suggestion that state courts consistently find takings liability in aircraft overflight cases is wrong. *See, e.g., Fitzgarrald*, 492 N.W.2d at 663-65 (rejecting physical invasion claim).

case states the "rule" that governs here. *See* Pet. at 18-19 (quoting *Brown*, 73 F.3d at 1103).

The so-called "updated approach" requested by Petitioners therefore is unnecessary. *See* Pet. at 23. This Court's modern takings jurisprudence, particularly *Penn Central* and its progeny, has provided more than ample guidance in how to resolve takings claims based on airport zoning height limitations. The proof is that every state court of last resort that has considered this issue during the past twenty years has reached the same conclusion as the Nevada Supreme Court – such height limitations do not effect a per se physical taking, but rather are appropriately examined under regulatory takings principles. *Tahoe-Sierra* is the most recent confirmation that the "default rule" applies in these cases, requiring a "fact specific inquiry" based on the multifactor *Penn Central* test, to determine whether a taking has occurred. *See Tahoe-Sierra*, 535 U.S. at 332, 341-42.

In sum, no "drastic split of authority" exists on this issue, as Petitioners attempt to convince the Court through their pattern of misinformation. *See* Pet. at 23. There is no split at all. Airspace does not enjoy special property status, but rather is subject to government regulation like any other property interest. On this basis, no further instruction from the Court is required at this time.

CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court deny the Petition for Writ of Certiorari in its entirety.

Respectfully submitted,

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APPENDIX

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED.....App. 1

United States Constitution, Fifth Amendment ....App. 1

United States Constitution, Fourteenth Amendment, § 1 .....App. 1

Nevada Constitution, Article I, § 8(6) .....App. 1

NRS 493.040 .....App. 2

NRS 493.050(1)(a) .....App. 2

NRS 497.030(1)(a), (b), and (c) .....App. 2

NRS 497.040 .....App. 3

49 U.S.C. § 40102(a)(32).....App. 3

49 U.S.C. § 40103(a)(1).....App. 4

49 U.S.C. § 40103(a)(2).....App. 4

Ordinance 728, Clark County, Nevada .....App. 5

Ordinance 1221, Clark County, Nevada .....App. 23

DEFENDANTS' THIRD AMENDED ANSWER AND COUNTERCLAIM .....App. 43

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment, § 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nevada Constitution, Article I, § 8(6):

"Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public

peril, in which case compensation shall be afterward made."

NRS 493.040:

"The ownership of the space above the waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in NRS 493.050."

NRS 493.050(1)(a):

"1. Flight in aircraft over lands and waters of this state is lawful:

(a) Unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water is put by the owner."

NRS 497.030(1)(a), (b), and (c):

"1. It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, takeoff and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared:

(a) That the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question.

(b) That it is therefore necessary in the interest of the public health, public safety and general welfare that

the creation or establishment of airport hazards be prevented.

(c) That this should be accomplished, to the extent legally possible, by exercise of the police power without compensation."

NRS 497.040:

"In order to prevent the creation or establishment of airport hazards, every political subdivision having an airport hazard area within its territorial limits may adopt, administer and enforce, under the police power and in the manner and upon which the conditions prescribed in this chapter, airport zoning regulations for such airport hazard area, which regulations may divide such area into zones, and, within such zones, prohibit those land uses which could cause a hazard to air traffic and regulate and restrict the height to which structures and trees may be erected or allowed to grow."

49 U.S.C. § 40102(a)(32):

"In this part –

'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft."

49 U.S.C. § 40103(a)(1):

"The United States Government has exclusive sovereignty of airspace of the United States."

49 U.S.C. § 40103(a)(2):

"A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals."

Bill No. 12-16-80-2

SUMMARY – An Ordinance adopting a new Chapter 29.50 to limit the height of objects around all public use airports within Clark County, Nevada, and repealing the existing Chapter 29.50.

ORDINANCE NO. – 728
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29 OF THE CLARK COUNTY CODE BY ADDING THERETO A NEW CHAPTER DESIGNATED AS 29.50 WHICH REGULATES AND RESTRICTS THE HEIGHT OF STRUCTURES AND OTHERWISE REGULATES THE USE OF THE PROPERTY WITHIN THE JURISDICTION OF CLARK COUNTY, NEVADA AND IN THE VICINITY OF ALL PUBLIC USE AIRPORTS BY CREATING THE APPROPRIATE ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE MC CARRAN INTERNATIONAL AIRPORT AIRSPACE ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; REPEALING THE EXISTING CHAPTER 29.50 OF THE CLARK COUNTY CODE; PROVIDING FOR ENFORCEMENT AND PROVIDING OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Legislative Findings. It is hereby found that an obstruction has the potential for endangering the lives and property of users of any public use Airport, and property or occupants of land within Clark

County, Nevada, in the vicinity of these Airports; that an obstruction may affect existing and future instrument approach minimums of any public use Airport; that an obstruction may reduce the size of the areas available for the landing, takeoff, and maneuvering of aircraft, thus tending to destroy or impair the utility and capacity of these Airports and the public investment therein. Accordingly, it is declared:

(A) That the establishment of an obstruction has the potential of being a public nuisance and may injure the region served by McCarran International Airport or any other public use Airport;

(B) That it is necessary in the interest of the public health, public safety, and general welfare that the establishment of obstructions that are a hazard to air navigation be prevented; and

(C) That the prevention of these obstructions should be accomplished to the extent legally possible by the exercise of the police power without compensation.

SECTION 2. That the present Chapter 29.50 of the Clark County Code is hereby repealed in its entirety.

SECTION 3. That a new Chapter 29.50 be adopted as follows:

CHAPTER 29.50

PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS

Sections:

29.50.010 Definitions
29.50.020 Airport zones
29.50.030 Airport zone height limitations

29.50.040 Use restrictions
29.50.050 Nonconforming uses
29.50.060 Variances

29.50.010 DEFINITIONS. As used in this Ordinance, unless the context otherwise requires;

1. PUBLIC USE AIRPORT – means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

2. AIRPORT ELEVATIONS – The highest point of an airport's usable landing area measured in feet above mean sea level.

3. APPROACH SURFACE – A surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as the approach zone height limitation slope set forth in Section 29.50.030 of this Ordinance. In plan the perimeter of the approach surface coincides with the perimeter of the approach zone.

4. APPROACH, TRANSITIONAL, HORIZONTAL, AND CONICAL ZONES – These zones are set forth in Section 29.50.020 of this Ordinance.

5. CONICAL SURFACE – A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(6) HAZARD TO AIR NAVIGATION – An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of the navigable airspace.

(7) HEIGHT – For the purpose of determining the height limits in all zones set forth in this Ordinance and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(8) HORIZONTAL SURFACE – A horizontal plane 150 feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) LARGER THAN UTILITY RUNWAY – A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet power aircraft.

(10) NONCONFORMING USE – Any pre-existing structure or use of land which is inconsistent with the provisions of this Ordinance or an amendment thereto.

(11) NONPRECISION INSTRUMENT RUNWAY – A runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

(12) OBSTRUCTION – Any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030 of this Ordinance.

(13) PERSON – An individual, firm, partnership, corporation, company, association, joint stock association,

or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

(14) PRECISION INSTRUMENT RUNWAY – A runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on an approved airport layout plan.

(15) PRIMARY SURFACE – A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway, when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

(16) RUNWAY – a defined area on an airport prepared for landing and take-off of aircraft along its length.

(17) STRUCTURE – An object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

(18) TRANSITIONAL SURFACES – These surfaces extend outward at 90 degree angles to the runway centerline and the runway centerline extended at a slope of seven (7) feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional

surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at 90 degree angles to the extended runway centerline.

(19) TREE – Any object of natural growth

(20) UTILITY RUNWAY – A runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

(21) VISUAL RUNWAY – A runway intended solely for the operation of aircraft using visual approach procedures.

29.50.020 AIRPORT ZONES. In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the airspace above the height of 35 feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces as they apply to the portions of any public use Airport lying within the jurisdiction of Clark County, Nevada. Such zones for McCarran International Airport are shown on the McCarran International Airport Airspace Zoning Map consisting of three (3) sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979, a copy of which is on file at the County Clerk's office and which is hereby incorporated by reference and made a part hereof. An area located in more than one (1) of the following zones is considered to be only in the zone with the more restrictive height limitations. The various zones are hereby established and defined as follows:

(A) Runway Approach Zones

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone – Runways 19R, 01L.

The inner edge of this approach zone coincides with the width of the primary surface and is 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones – Runways O1R, 07L, 07R.

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones – Runways 19L, 25R, 25L

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface 250 feet wide.

The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 2,000 feet at a horizontal distance 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger Than Utility Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger Than Utility with A Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 3,500 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger Than Utility With A Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 4,000 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

f. Precision Instrument Runway Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(B) Transition Zones

Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the

instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone

The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of 5,000 feet radii for all runways designated utility or visual and 10,000 feet radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of 150 feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone

The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one (1) foot in height for every twenty (20) feet of horizontal distance outward therefore a distance of 4,000 feet. The conical zone does not include the instrument approach zones or transition zones.

29.50.030 AIRPORT ZONE HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure shall be erected, alerted, or maintained in any zone created by this Ordinance to a height in excess of the applicable height limit herein established for such zone. However, nothing in this Ordinance shall be construed as prohibiting the construction or maintenance of any structure to a height up to 35 feet above the surface of the land in any zone created by this Ordinance. Further, no building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United

States of America and the Director of Aviation of Clark County shall have determined that the building or structure is so situated or marked that it would not be a hazard. All construction within the various height zones shall be subject to the property owners' signing an avigation easement. Such applicable height limitations are hereby established for each of the zones in question as follows:

(A) Runway Approach Zones

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone – Runways 19R, 01L

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones – Runways 01R, 07L, 07R

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones – Runway 19L, 25R, 25L.

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to

an additional horizontal distance of 40,000 feet along the extended runway centerline.

(2) All other Public Use Airports

(a) Utility Runway Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(d) Runway Larger than Utility With a Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

(e) Runway Larger than Utility With a Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone.

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(B) Transition Zones

Slope one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of 150 feet above the airport elevation. In addition to the foregoing, there are established height limits of one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one (1) foot for each seven (7) feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach

surface, and extending a horizontal distance of 5,000 feet measured at 90 degree angles to the extended runway centerline.

(C) Horizontal Zone

One hundred fifty (150) feet above the established Airport elevation.

(D) Conical Zone

One (1) foot vertical height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of 4,000 feet to a height of 350 feet above the airport elevation.

29.50.040 USE RESTRICTIONS

Notwithstanding any other provisions of this Ordinance, no use may be made of land or water within any zone established by this Ordinance in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

29.50.050 NONCONFORMING USES

(A) Regulations Not Retroactive

The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure not

conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of a nonconforming use. Nothing contained herein shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(B) Marking and Lighting

Notwithstanding the preceding provisions of this Section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the Director of Aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction.

29.50.060 VARIANCES

(A) Future Uses

Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regulations, may apply to the Clark County Planning Commission for a variance from these regulations. Such variances will be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code. Any such variance allowed may be subject to any reasonable conditions that the Clark County Planning Commission or Board of County Commissioners may deem

necessary to effectuate the purposes of Chapter 29.66 of the Clark County Code, including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the Board of Clark County Commissioners, this condition may be modified to require the owner to permit Clark County, at its own expense, to install, operate, and maintain the necessary markings and lights.

(B) Existing Uses

No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this Ordinance or any amendments thereto or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed

Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than 50 percent (50%) torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 4: Enforcement and Penalties.

The penalties and enforcement provisions set forth in Chapter 29.74 of the Clark County Code shall govern the provisions of this Chapter.

SECTION 5: If any section of this Ordinance or portion thereof is for any reason held invalid or unconstitutional by

any court of competent jurisdiction, such holding shall not invalidate the remaining portions of this Ordinance.

SECTION 6: All Ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 7: This Ordinance shall take effect and be in force from and after its passage and publication thereof by title only, together with the names of the County Commissioners voting for or against the passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED ON THE 16th DAY OF December, 1980

PROPOSED BY: Thalia Dondero

PASSED ON THE 20th DAY OF January, 1981

VOTE: AYES Robert N. Broadbent
David Canter
Manuel Cortez
Thalia Dondero
Jack R. Petitti
Richard J. Ronzone

NAYS None

ABSTAINING None

ABSENT Woodrow Wilson

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

BY: /s/ Manuel Cortez
Chairman, MANUEL CORTEZ

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This Ordinance shall be in force and effect from and after the 3rd day of February, 1981.

APPROVED AS TO FORM:
ROBERT J. MILLER, DISTRICT ATTORNEY

By: /s/ Thomas R. Severns
Deputy, THOMAS R. SEVERNS

CLARK COUNTY NEVADA
JEAN L. SWIFT, RECORDER
RECORDED AT REQUEST OF
CLARK COUNTY CLERK

FEB 5 11 09 AM 81

[Illegible]

1352 1311148

RETURN TO
COUNTY CLERK

COUNTY CLERK'S OFFICE
COUNTY COMMISSIONER
DIVISION
VALLEY BANK PLAZA
11th FLOOR
LAS VEGAS, NEVADA

[Bracketed] material is that portion being deleted
Underlined material is that portion being added

BILL NO. 6-20-90-2

SUMMARY – An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50. PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

[(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as approach zone height limitation slope set forth in Section 29.50.030. In plan, the perimeter of the approach surface coincides with the perimeter of the approach zone.

(4) "Approach, transitional, horizontal, and conical zones" are as set forth in Section 29.50.020.

(5) "Conical Surface" means a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20:1 for a horizontal distance of four thousand feet.]

[(6)] (3) "Hazard to air navigation" means an obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

[(7)] **(4)** "Height." For the purpose of determining the height limits in all zones set forth in this chaper and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

[(8) "Horizontal surface" means a horizontal plane one hundred fifty feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) "Larger than utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of greater than twelve thousand five hundred pounds maximum gross weight and jet power aircraft.]

[(10)] **(5)** "Nonconforming use" means any preexisting structure or use of land which is inconsistent with the provisions of this chapter or an amendment thereto.

[(11) "Nonprecision instrument runway" means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.]

[(12)] **(6)** "Obstruction" means any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030.

[(13)] **(7)** "Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

[(14) "Precision instrument runway" means a runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on the Official Airport Airspace Zoning Maps.

(15) "Primary surface" means a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each and of that runway, when the runway has no specially prepared hard surface or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.]

[(16)] **(8)** "Runway" means a defined area on an airport prepared for landing and takeoff of aircraft along its length.

(9) "Runway Protection Zone" (formerly "Runway Clear Zone") means a trapezoidal area at ground level, for the purpose of protecting the safety of approaches and keeping the area clear of the congregation of people.

[(18)] **(10)** "Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

[(19) "Transitional surfaces" mean surfaces which extend outward at ninety degree angles to the runway

centerline, and the runway centerline extended at a slope of seven feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of five thousand feet measured horizontally from the edge of the approach surface and at ninety degree angles to the extended runway centerline.]

[(20)] **(11)** "Tree" means any object of natural growth.

[(21) "Utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of twelve thousand five hundred pounds maximum gross weight and less.

(22) "Visual runway" means a runway intended solely for the operation of aircraft using visual approach procedures. (Ord. 728 & 3 (part), 1981)]

29.50.020 Airport zones. In order to carry out the provisions of this chapter, there are created and established certain zones which include all of the airspace above the height of thirty-five feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces, as they apply to the portions of any public use airport lying within the jurisdiction of Clark County, Nevada. Such zones for [McCarran International Airport] **each public use airport** are shown on the [McCarran International] **Official** Airport Airspace Zoning Map [consisting of three sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979,] **for each public**

use airport as adopted by specific map as put forth in §29.50.050. [a copy of which is on file at the county clerk's office and which is hereby incorporated by reference and made a part hereof.] An area located in more than one of the [following] airport zones is considered to be only in the zone with the more restrictve height limitations.

[(A) Runway Approach Zones.

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone Runways 19R, 01L. The inner edge of this approach zone coincides with the width of the primary surface and is two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones – Runways 01L, 07L, 07R. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones Runways 19L, 25R, 25L. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the

primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of two thousand feet at a horizontal distance five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger than Utility Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger than Utility with a Visibility minimum Greater than Three-fourths Mile Nonprecision Instrument approach Zone. The inner edge of this approach zone coincides with the width of the

primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of three thousand five hundred feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger than Utility with a Visibility Minimum as Low as Three-fourths Mile Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of four thousand feet at a horizontal distance of ten thousand from the primary surface. Its centerline is the continuation of the centerline of the runway.

(f) Precision Instrument Runway Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance fof fifty thousand feet from the primary surface. It centerline is the continuation of the centerline of the runway.

(B) Transition Zones. Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend out-ward from the primary surface and shall slope upward and outward one foot vertically for each seven feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones, and slope upward and

outward at the rate of one foot vertically for each seven feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of five thousand feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone. The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of five thousand feet radii for all runways designated utility or visual and ten thousand feed radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of one hundred fifty feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone. The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one foot in height for every twenty feet of horizontal distance outward therefore for a distance of four thousand feet to a height of three hundred and fifty (350) feet above the airport elevation. The conical zone does not include the instrument approach zones or transition zones. (Ord. 728 & 3 (part), 1980)]

29.50.030 Airport zone height limitations. (A) Except as otherwise provided in this chapter, no structure shall be erected, [alerted] **altered**, or maintained in any

airport zone [created by this chapter to a height] **that would violate the height limitations depicted in the maps adopted herewith** [in excess of the applicable height limit established in this chapter for such zones]. However, nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter. [Further, no Building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the director of aviation of the county shall have determined that the building or structure is so situated or marked that it would not be a hazard) Any building or structure constructed within the zones shall be situated or marked as approved by the Federal Aviation Administration and the Clark County Department of Aviation so that it does not constitute a hazard as defined in Section 29.50.010(3). All construction within the various height zones shall be subject to the property owner's signing an avigation easement. [Such applicable height limitations are established for each of the zones in question as follows:

(A) Runway Approach Zones.

(1) McCarran International Airport.

(a) Utility Runway Visual Approach Zone – Runways 19R, 01L. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones – Runways 01R, 07L, 07R. Slopes twenty

feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones Runway 19L, 25R, 25L. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forty thousand feet along the extended runway centerline.

(2) All Other Public Use Airports.

(a) Utility Runway visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(d) Runway Larger than Utility with a visibility Minimum Greater than Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(e) Runway Larger than Utility with a Visibility Minimum As Low as Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forth thousand feet along the extended runway centerline.

(B) Transition Zones. Slopes one foot vertically for each seven feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of one hundred fifty feet above the airport elevation. In addition to the foregoing, there are established height limits of one foot vertically for each seven feet horizontally beginning a the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where

they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one foot for each seven feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of five thousand feet measured at ninety degree angles to the extended runway centerline.

(C) Horizontal Zone. One hundred fifty feet above the established airport elevation.

(D) Conical Zone. One foot vertical height for each twenty feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of four thousand feet to a height of three hundred fifty feet above the airport elevation. (Ord. 728 &3 (part), 1980)]

29.50.040 Notices of Construction or Alteration.

(A) Any person proposing construction or alteration in the environs of any public use airport or airport operated by the United States Armed Services shall notify the Chief, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located not less than thirty days before the commencement of the construction or alteration if such construction or alteration exceeds any of the following height standards:

(1) Two hundred (200) feet above the ground level at its site.

(2) The plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a

horizontal distance of 20,000 feet from the nearest point of the nearest runway of any airport subject to the provisions of this chapter.

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards set forth in subparagraphs (1) or (2) hereinbefore after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: 17 feet

(b) For any other public roadways: 15 feet

(c) For any private road: 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater.

(d) For any railroad: 23 feet

(e) For a waterway or any otherunspecified traverse way: the height of the highest mobile object that would normally use the traverse way.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the Federal Aviation Administration.

(B) Construction or Alteration not requiring notice. Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(4) Any construction or alteration for which notice is required by any other FAA regulation.

29.50.050 Official Airport Airspace Zoning Maps. The following official airport airspace zoning maps for specific public use airports lying within the jurisdiction of Clark County, Nevada, as adopted by ordinance of The Board of Clark County Commissioners, are on file at the office of the

County Clerk and hereby incorporated by reference and made a part hereof:

(A) **The McCarran International Airport Official Airspace Zoning Map, consisting of five (5) sheets,prepared by the Clark County Airport Engineering Department dated** July 18, 1990 **and adopted by Ordinance Number** 1221 .

(B) **The North Las Vegas Air Terminal Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated** July 18, 1990 **and adopted by Ordinance Number** 1221 .

(C) **The Overton Airport Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated** July 18, 1990 **and adopted by Ordinance Number** 1221 .

(D) **The Jean Airport Official Airspace Zoning Map consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated** July 18, 1990 **and adopted by Ordinance Number** 1221 .

29.50.060 Use restrictions. Notwithstanding any other provisions of this chapter, no use may be made of land or water within any zone established by this chapter in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or

otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport. (Ord. 728 & 3 (part), 1980)

29.50.070 Nonconforming uses. (A) Regulations Not Retroactive. The regulations prescribed by this chapter shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this chapter, or otherwise interfere with the continuance of a nonconforming use. Nothing contained in this chapter shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this chapter, and is diligently prosecuted.

(B) Marking and Lighting. Notwithstanding the preceding provisions of this section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the director of aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. (Ord. 728 & 3 (part), 1980)

29.50.080 Variances. (A) Future Uses. Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regulations, may apply to the county planning commission for a variance from these regulations. Such variances [will] **may** be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but

would do substantial justice and be in accordance with the spirit of these regulations [and of Chapter 29.66]. Any such variance allowed may be subject to any reasonable conditions that the county planning commission or board of county commissioners may deem necessary to effectuate the purposes of [Chapter 29.66,] Title 29 including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the board of county commissioners, this condition may be modified to require the owner to permit the county, at its own expense, to install, operate, and maintain the necessary markings and lights. Variances pursuant to this chapter shall be considered under the procedures put forth under Section 29.66 of this title with the exception that the applicant shall notify the FAA Regional Office of the application prior to the time of submission of the variance application and that the Planning Commissions' action concerning the variance application shall be considered advisory only, with all variances being referred to the Board of County Commissioners for final disposition.

(B) Existing Uses. No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this chapter or any amendments thereto, or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed. Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than fifty percent torn down, physically deteriorated, or

decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 2. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

SECTION 3. All ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and the publication thereof by title only, together with the names of the County Commissioners voting for or against its passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED on the 20th day of June, 1990.

PROPOSED BY Manuel J. Cortez &
William U. Pearson

PASSED on the 18th day of July, 1990.

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Manuel J. Cortez
Thalia M. Dondero
Karen Hayes

NAYS: None

ABSTAINING: None

ABSENT: William U. Pearson

Bruce L. Woodbury

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

By /s/ Bruce L. Woodbury
Chairman

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This ordinance shall be in force and effect from and after the 1st day of August, 1990.

AANS-A
KERMITT L. WATERS
Nevada Bar #2571
438 E. Sahara Avenue
Las Vegas, Nevada 89104
(702) 733-8877
Attorney for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Plaintiff,

vs.

TIEN FU HSU; UNITED TITLE OF NEVADA, formerly known as CHICAGO TITLE AGENCY OF LAS VEGAS, a Nevada corporation; TIERRA VENTURE, a general partnership; JOHN DOE X; JANE DOE I through JANE DOE X; DOE CORPORATION I through DOE CORPORATION X; and DOE PARTNERSHIP I through DOE PARTNERSHIP X,

Defendants, /

CASE NO. A332441
DEPT. NO. VII
DOCKET NO. "P"

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Plaintiff,

vs.

LISA SU FAMILY TRUST, LISA SU TRUSTEE, PETER B. LIAO, COAST FED SERVICES, COAST SAVINGS AND LOAN ASSOCIATION, CHICAGO TITLE AGENCY OF LAS VEGAS, INC., GUARDIAN BANK, TITLE INSURANCE AND TRUST COMPANY, GERALD JENKINS and R. JOANN JENKINS, L.V. LAND CO., and L.A. LAND CO.,

Defendants. /

CASE NO. A333961
DEPT. NO. VII
DOCKET NO. "P"

DEFENDANTS' THIRD AMENDED ANSWER AND COUNTERCLAIM

(Filed Oct. 14, 1997)

DEFENDANTS THIRD AMENDED ANSWER AND COUNTERCLAIM TO PLAINTIFF'S AMENDED COMPLAINT IN CASE NO. A332441, COUNTY V. TIEN FU HSU, ET AL.,

Defendants, WESTPARK INC, a corporation of which Tien Fu Hsu is President and is the sole owner of all of the stock, and TIEN FU HSU, by and through their attorney, KERMITT L. WATERS, in answer to Plaintiffs Amended Complaint, admits, denies and alleges as follows:

I.

Defendants admit the allegations contained in paragraphs 1, 2, 3, 4,6, 7, 14, 15 and 17.

II

Defendants deny the allegations contained in paragraphs 5, 8, 10 and 16.

III

As to paragraphs 6 and 11, defendants admit the allegations contained therein, except for the parts setting forth the description of the property

IV

Defendants admit the allegations contained in paragraph 12, but deny that this allegation correctly depicts the extent of the total project, and further deny that plaintiff has fully described all of the property being taken or damages to the remainder property.

V

Defendants admit the allegations contained in paragraph 13, but affirmatively allege that unreasonable delay on the part of the plaintiff as to the widening of Tropicana Avenue resulted in a de facto taking of defendant's property within six months of May 5, 1992, the date on which the Board of County Commissioners authorized the condemnation of the subject property.

COUNTERCLAIM

Defendants, WESTPARK INC, a corporation of which Tien Fu Hsu is President and is the sole owner of all of the stock, and TIEN FU HSU, by and through their attorney,

KERMITT L. WATERS, allege the following counterclaims against the plaintiff, Clark County:

1. That Defendants, WESTPARK INC, a corporation of which Tien Fu Hsu is President and is the sole owner of all of the stock, and TIEN FU HSU are the owners of certain property which is the subject matter of this action and which is located in Clark County, Nevada, which is more fully described below:

ORIGINAL PARCEL BEFORE THE TAKE

PARCEL I

THE EAST 330.00 FEET OF THE WEST 660.00 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B.& M.

EXCEPT THE INTEREST IN THE SOUTH 50.00 FEET OF SAID LAND AS CONVEYED TO STATE OF NEVADA BY DEED RECORDED MAY 18, 1959 IN BOOK 198 OF OFFICIAL RECORDS, AS DOCUMENT NO. 1060956.

FURTHER EXCEPTING THEREFROM THAT PORTION OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, INCLUDED WITHIN THE CIRCUMFERENCE OF A CIRCLE HAVING A RADIUS OF SEVENTY FEET (70.00'), WHOSE RADIUS POINT IS THE INTERSECTION OF THE SOUTH LINE OF THE NORTH FORTY FEET (40.00') AND THE WEST LINE OF THE EAST THIRTY FEET (30.00') OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21,

TOGETHER WITH THAT PORTION OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21 LYING NORTHWESTERLY OF A CURVE CONCAVE SOUTHEASTERLY, HAVING A RADIUS OF TWENTY-FIVE FEET (25.00'), WHICH CURVE IS TANGENT TO BOTH THE AFORE DESCRIBED CURVE HAVING A RADIUS OF SEVENTY FEET (70.00') AND THE EAST LINE OF THE WEST THIRTY FEET (30.00') OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21.

FURTHER EXCEPTING THEREFROM THE WEST THIRTY FEET (30.00') OF THE EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.M., NEVADA, TOGETHER WITH THAT CERTAIN SPANDREL AREA IN THE SOUTHWEST CORNER OF THE INTERSECTION OF DECKOW LANE AND TROPICANA.

ASSESSOR'S PARCEL NUMBER 162-21-802-001

PARCEL II

THAT PORTION OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.M., MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID SECTION 21: THENCE S 89°50'40" W ALONG THE SOUTH LINE THEREOF, A DISTANCE OF 988.08

FEET TO THE SOUTHWEST CORNER OF THAT PARCEL OF LAND CONVEYED TO MAC L. GILS BY DEED RECORDED SEPTEMBER 22, 1953, AS DOCUMENT NO. 414266, CLARK COUNTY, NEVADA RECORDS, SAID SOUTHWEST CORNER BEING THE TRUE POINT OF BEGINNING.

THENCE CONTINUING S 89°50'40" W ALONG SAID SOUTH LINE A DISTANCE OF 493.35 FEET TO THE SOUTHWEST CORNER OF THAT PARCEL OF LAND CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE BY DEED RECORDED JULY 21, 1953 AS DOCUMENT NO. 409288, CLARK COUNTY, NEVADA RECORDS;

THENCE N 0°08'45" W A DISTANCE OF 1,305.52 FEET TO THE NORTHEAST CORNER OF THAT PARCEL OF LAND CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE BY DEED RECORDED AUGUST 11, 1953 AS DOCUMENT NO. 411261., CLARK COUNTY, NEVADA RECORDS;

THENCE N 89°59'10" E ALONG THE NORTH LINE OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SAID SECTION 21, A DISTANCE OF 495.27 FEET, MORE OR LESS, AT A POINT IN THE WEST LINE OF THE AFOREMENTIONED PARCEL CONVEYED BY DOCUMENT NO. 414266;

THENCE S 0°03'41" E ALONG SAID WEST LINE, A DISTANCE OF 1,304.44 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION THEREOF AS CONVEYED TO THE STATE OF NEVADA BY DEED

RECORDED MAY 29, 1959 AS DOCUMENT NO. 162199 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

ASSESSOR'S PARCEL NUMBER 162-21-802-005

REMAINING PARCEL AFTER THE TAKE

PARCEL I

THE EAST 330.00 FEET OF THE WEST 660.00 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B.& M.

EXCEPT THE INTEREST IN THE SOUTH 50.00 FEET OF SAID LAND AS CONVEYED TO STATE OF NEVADA BY DEED RECORDED MAY 18, 1959 IN BOOK 198 OF OFFICIAL RECORDS, AS DOCUMENT NO. 1060956.

FURTHER EXCEPTING THEREFROM THAT PORTION OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, INCLUDED WITHIN THE CIRCUMFERENCE OF A CIRCLE HAVING A RADIUS OF SEVENTY FEET (70.00'), WHOSE RADIUS POINT IS THE INTERSECTION OF THE SOUTH LINE OF THE NORTH FORTY FEET (40.00') AND THE WEST LINE OF THE EAST THIRTY FEET (30.00') OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, TOGETHER WITH THAT PORTION OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21 LYING NORTHWESTERLY OF A CURVE CONCAVE SOUTHEASTERLY, HAVING A RADIUS OP TWENTY-FIVE

FEET (25.00'), WHICH CURVE IS TANGENT TO BOTH THE AFOREDESCRIBED CURVE HAVING A RADIUS OF SEVENTY FEET (70.00') AND THE EAST LINE OF THE WEST THIRTY FEET (30.00') OF SAID EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21.

FURTHER EXCEPTING THEREFROM THE WEST THIRTY FEET (30.00') OF THE EAST HALF (E ½) OF THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.M., NEVADA, TOGETHER WITH THAT CERTAIN SPANDREL AREA IN THE SOUTHWEST CORNER OF THE INTERSECTION OF DECKOW LANE AND TROPICANA.

FURTHER EXCEPTING THEREFROM COMMENCING AT THE SOUTHEAST CORNER OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21; THENCE N 00°16'36" W, A DISTANCE OF 43.79 FEET TO A POINT ON THE NORTH RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100' R/W) ALSO BEING THE POINT OF BEGINNING; THENCE S 89°09'00" W ALONG SAID NORTH RIGHT-OF-WAY LINE, A DISTANCE OF 275.57 FEET; THENCE CURVING TO THE RIGHT ALONG A 25.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 90°30'40", AN ARC LENGTH OF 39.49 FEET TO THE EAST RIGHT-OF-WAY LINE OF DECKOW LANE (60.00' R/W); THENCE N 00°20'20" W ALONG SAID EAST RIGHT-OF-WAY LINE OF DECKOW

LANE, A DISTANCE OF 48.87 FEET TO A POINT OF CUSP TO WHICH A RADIAL LINE BEARS S 89°39'40" W; THENCE FROM A TANGENT WHICH BEARS S 00°20'20" E CURVING TO THE LEFT ALONG A 35.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 89°46'55", AN ARC LENGTH OF 54.84 FEET TO A POINT OF COMPOUND CURVATURE TO WHICH A RADIAL LINE BEARS S 00°07'15" E; THENCE CURVING TO THE LEFT ALONG A 11,399.30 FOOT RADIUS CURVE, CONCAVE NORTHERLY, THROUGH A CENTRAL ANGLE OF 00°02'28", AN ARC LENGTH OF 8.17 FEET TO A POINT OF REVERSE CURVATURE TO WHICH A RADIAL LINE BEARS S 00°09'43" E; THENCE CURVING TO THE RIGHT ALONG 4,636.66 FOOT RADIUS CURVE CONCAVE SOUTHERLY THROUGH A CENTRAL ANGLE OF 02°08'14", AN ARC LENGTH OF 172.95 FEET; THENCE S 88°01'29" E, A DISTANCE OF 44.68 FEET; THENCE CURVING TO THE LEFT ALONG A 35.00 FOOT RADIUS CURVE, CONCAVE NORTHWESTERLY, THROUGH A CENTRAL ANGLE OF 92°17'44", AN ARC LENGTH OF 56.38 FEET TO A POINT TO WHICH A RADIAL LINE BEARS N 89°40'47" E, THENCE N 89°40'47" E, A DISTANCE OF 3.85 FEET; THENCE S 00°16'36" E, A DISTANCE OF 65.78 FEET TO THE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-802-001

PARCEL II

THAT PORTION OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SECTION 21, TOWNSHIP

21 SOUTH, RANGE 61 EAST, M.D.M., MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID SECTION 21: THENCE S 89°50'40" W ALONG THE SOUTH LINE THEREOF, A DISTANCE OF 988.08 FEET TO THE SOUTHWEST CORNER OF THAT PARCEL OF LAND CONVEYED TO MAC L. GILS BY DEED RECORDED SEPTEMBER 22, 1953, AS DOCUMENT NO. 414266, CLARK COUNTY, NEVADA RECORDS, SAID SOUTHWEST CORNER BEING THE TRUE POINT OF BEGINNING.

THENCE CONTINUING S 89°50'40" W ALONG SAID SOUTH LINE A DISTANCE OF 493.35 FEET TO THE SOUTHWEST CORNER OF THAT PARCEL OF LAND CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE BY DEED RECORDED JULY 21, 1953 AS DOCUMENT NO. 409288, CLARK COUNTY, NEVADA RECORDS;

THENCE N 0°08'45" W A DISTANCE OF 1,305.52 FEET TO THE NORTHEAST CORNER OF THAT PARCEL OF LAND CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE BY DEED RECORDED AUGUST 11, 1953 AS DOCUMENT NO. 411261., CLARK COUNTY, NEVADA RECORDS;

THENCE N 89°59'10" E ALONG THE NORTH LINE OF THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SAID SECTION 21, A DISTANCE OF 495.27 FEET, MORE OR LESS, AT A POINT IN THE WEST LINE OF THE AFOREMENTIONED PARCEL CONVEYED BY DOCUMENT NO. 414266;

THENCE S 0°03'41" E ALONG SAID WEST LINE, A DISTANCE OF 1,304.44 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION THEREOF AS CONVEYED TO THE STATE OF NEVADA BY DEED RECORDED MAY 29, 1959 AS DOCUMENT NO. 162199 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

FURTHER EXCEPTING THEREFROM COMMENCING AT THE SOUTHEAST CORNER OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER OF SAID SECTION 21; THENCE S 89°50'06" W ALONG THE SOUTH LINE THEREOF, A DISTANCE OF 163.34 FEET; THENCE N 00°11'23" W, A DISTANCE OF 49.70 FEET TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100' R/W) ALSO BEING THE POINT OF BEGINNING; THENCE CONTINUING N 00°11'23" W, 47.11 FEET; THENCE N 89°49'48" E, 3.79 FEET; THENCE S 45°51'00" E, 33.66 FEET; THENCE N 89°09'00" E, 195.92 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 68°21'04" E; THENCE CURVING TO THE LEFT ALONG A 30.00 FOOT RADIUS CURVE, CONCAVE NORTHWESTERLY, THROUGH A CENTRAL ANGLE OF 22°10'38", AN ARC LENGTH OF 11.61 FEET; THENCE N 00°31'42" W, 12.59 FEET; THENCE N 89°28'18" E, 49.21 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 89°25'55" W; THENCE CURVING TO THE LEFT ALONG A 30.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 44°19'29", AN ARC LENGTH OF 23.21 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 45°06'26" W; THENCE N 43°36' 17" E, 4.22 FEET TO A POINT TO WHICH A RADIAL LINE BEARS SOUTH 43°36'17" W; THENCE CURVING

TO THE LEFT ALONG A 25.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 24°22'20, AN ARC LENGTH OF 10.63 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 19°13'57" W; THENCE N 89°09'00" E, 197.09 FEET; THENCE S 00°05'46" W, 23.26 FEET TO A POINT ON THE NORTH RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100' R/W); THENCE S 89°09'00" W ALONG SAID NORTH RIGHT-OF-WAY LINE, 492.66 FEET TO THE POINT OF BEGINNING.

FURTHER EXCEPTING THEREFROM COMMENCING AT THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21; THENCE S 89°50'06" E ALONG THE SOUTH LINE OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, A DISTANCE OF 248.32 FEET; THENCE N 00°51'00" W, 77.87 FEET TO THE POINT OF BEGINNING; THENCE N 00°51'00" W, 5.00 FEET; THENCE N 89°09'00" E, 30.00 FEET; THENCE S 00°51'00" E, 5.00 FEET; THENCE S 89°09'00 W, 30.00 FEET TO THE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-802-005

2. That Defendant, TIEN FU HSU, is also a part owner of the Lisa Su Trust, which is the Defendant landowner of the adjacent two parcels of property which is also the subject of condemnation in the companion and consolidated case herein, Case No. A333961.

3. That at the time of Plaintiffs acts complained of herein, Defendants were the owner in fee simple of the subject real property described above.

4. That Plaintiff's Amended Complaint on file herein fails to fully set forth the extent of the taking of Defendants property or the damages to the remainder of Defendants property not taken, and fails to describe fully the Defendants remaining property.

5. That the larger parcel, out of which plaintiff's Amended Complaint alleges a partial taking, contains 38.188 acres and is described above as the original parcel before the take.

6. That, in addition to the taking and damages described in Plaintiffs Complaint, Plaintiff damaged Defendant's property by imposing building height restrictions by Clark County Ordinances No. 728 and 1221 for the purpose of protecting the vertical and horizontal glide slope for Runway 19R: Plaintiff enacted a building height restriction which imposed an avigation easement (hereinafter "avigation easement") across Defendant's property in 1981 and enacted a subsequent height restriction which imposed a second avigation easement across and above Defendant's property in 1990. Defendants were not aware of the taking of these avigation easements until they recently observed heavy construction equipment being used to extend Runway 19R at McCarran International Airport and when, upon further investigation, they learned on October 13 and 14, 1995, that these avigation easements will grossly limit the building height on the subject property.

7. That the taking of said avigation easements over Defendant's property directly and proximately causes Defendant's property to be damaged by a continual increase in dust, fumes, smoke, noise and vibrations by operation of McCarran Airport. According to Plaintiff's

own personnel and public pronouncements, the noise levels over defendant's property will increase in excess of 200% of the current noise levels as a result of the widening and extension of Runway 19R. The extension and widening of Runway 19R will substantially increase the noise, dust, fumes, smoke and vibration damage over and upon Defendant's property as described above to an unbearable and uninhabitable condition. As a result of Plaintiff's plan and construction, the extension and widening of Runway 19R will accommodate much larger aircraft and will place aircraft departing and landing substantially closer and lower to Defendant's property. Plaintiff believes and alleges that this will create a situation that will constructively evict the existing trailer home tenants, forcing them to have to be relocated.

8. That the height restrictions over the subject property in the after condition is as low as 30 feet. As such, Plaintiff has restricted the highest and best use of Defendant's property for development by limiting the buildable height to such an extent that the after condition value of the subject property is substantially impaired from its before condition value. See attached Air Space Zoning Chart, Exhibit A. Defendant's property had a highest and best use in the before condition for hotel/casino development. However, in the after condition, with the implementation of the height restrictions and the noise, dust fumes, smoke and vibrations as a result of the widening and extending by an additional 5,000 feet of Runway 19R at McCarran International Airport, defendant can no longer utilize his property in its highest and best use capacity as he was entitled to before Plaintiff took his property.

9. Defendants are not obligated to exhaust their administrative remedies by seeking a variance in the

height restriction because the ordinance provides no variance will be given. Therefore, such an attempt at exhaustion of administrative remedies would be futile.

10. Defendants complain and allege that Plaintiff CLARK COUNTY, acting through its McCarran International Airport, has taken and damaged Defendant's entire parcel. The Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Nevada Constitution require payment of just compensation to Defendant for both the taking of a part of Defendant's property and the damage to the remainder of Defendant's property described above by the taking of avigation easements.

11. Under the doctrine of collateral estoppel, Defendants must make this Counterclaim in this action in order not to have his claim barred in any subsequent action, as Defendant has now become aware of this claim. Since Clark County is the Plaintiff in this action for the taking of Defendant's property to widen Tropicana Avenue, and Clark County is the owner and operator of McCarran International Airport and is responsible for the taking of the avigation easements over Defendant's property, Defendant is obligated to bring all claims against the Plaintiff in this action.

DEFENDANT'S AMENDED ANSWER AND COUNTERCLAIM TO PLAINTIFF'S AMENDED COMPLAINT IN CASE NO, A333961, COUNTY V. LISA SU FAMILY TRUST, ET AL.

Defendants, LISA SU TRUST, LISA SU TRUSTEE, and PETER B. LIAO, by and through their attorney,

KERMITT L. WATERS, in answer to Plaintiff's Complaint, admits, denies, and alleges as follows:

I

Defendant admits the allegations contained in paragraphs 1,2,3,5,7,8,12 and 13.

II.

Defendant denies the allegations contained in paragraphs 4 and 6.

III

Defendant lacks sufficient information or belief to enable them to answer paragraphs 9, 10 and 11 and upon that ground, denies that allegations contained therein.

COUNTERCLAIM

Defendant, LISA SU TRUST, LISA SU TRUSTEE, and PETER B. LIAO, by and through their attorney, KERMITT L. WATERS, alleges the following counterclaims against the plaintiff, Clark County:

1. That Defendants, LISA SU TRUST, LISA SU TRUSTEE, and PETER B. LIAO are the owners of certain property which is the subject matter of this action and which is located in Clark County, Nevada, which is more fully described below:

ORIGINAL PARCEL BEFORE THE TAKE

PARCEL I

THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M.

SAVINGS AND EXCEPTING THEREFROM THE WEST 660 FEET THEREOF, AND THE EAST 265 FEET THEREOF.

FURTHER SAVING AND EXCEPTING THEREFROM ANY PORTION THEREOF LYING WITH TROPICANA AVENUE AS CONVEYED TO THE STATE OF NEVADA BY DEED RECORDED MAY 16, 1965 AS DOCUMENT NO. 1609955 OF OFFICIAL RECORDS.

FURTHER SAVING AND EXCEPTING THEREFROM AN EASEMENT FOR RIGHT-OF-WAY, OVER AND ACROSS A TWENTY (20) FOOT STRIP OF LAND TOGETHER WITH RIGHTS INCIDENTAL THERETO, AS RESERVED IN THE DEED, RECORDED AUGUST 11, 1953 IN BOOK 71 OF DEEDS, PAGE 350, AS DOCUMENT NO. 411261, OF OFFICIAL RECORDS.

ASSESSOR'S PARCEL NUMBER 162-21-802-002

PARCEL II

THE WEST 100 FEET OF THE EAST 265 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M.

ASSESSOR'S PARCEL NUMBER 162-21-802-003

EXCEPTING THEREFROM ANY PORTION OF SAID LAND LYING BETWEEN THE LEFT OF NORTHERLY

FIFTY (50) FOOT RIGHT-OF-WAY LINE, MEASURED AT RIGHT ANGLES TO THE CENTERLINE OF FAS-806 (BOND ROAD) AND THE SOUTH BOUNDARY OF SAID SOUTH 200 FEET OF THE WEST 100 FEET OF THE EAST 265 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, SAID CENTERLINE PERTINENT TO BUT NOT LIMITED TO THE ABOVE MENTIONED LAND, SAID CENTERLINE MORE FULLY DESCRIBED AS FOLLOWS: BEGINNING AT THE INTERSECTION OF THE WESTERLY BOUNDARY OF THE NORTHWEST QUARTER (NW ¼) OF THE NORTHEAST QUARTER (NE ¼) OF SECTION 28, TOWNSHIP 21 SOUTH, RANGE 61 EAST M.D.B. & M., WITH THE CENTERLINE OF FAS-806 (BOND ROAD) AT OR NEAR HIGHWAY ENGINEER'S STATION "03" 26+37.92 P.O.T. WHICH POINT BEARS S 0°18'31" E A DISTANCE OF 2.89 FEET FROM THE QUARTER SECTION CORNER COMMON TO SECTION 21 AND 28, THENCE S 89°01'51" E A DISTANCE OF 362.32 FEET TO HIGHWAY ENGINEER'S STATION "03" 30+00.24 ANGLE POINT LEFT; THENCE N 89°01'15" E A DISTANCE OF 2,272.30 FEET TO HIGHWAY ENGINEER'S STATION "03" 52+72.54 P.O.T. WHICH POINT BEARS N 0°07'12" E A DISTANCE OF 17.39 FEET FROM THE SOUTHEAST SECTION CORNER OF 21, AS CONVEYED TO THE STATE OF NEVADA FOR HIGHWAY AND INCIDENTAL PURPOSES BY DEED RECORDED AUGUST 18, 1959 AS DOCUMENT NO. 170714 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

ASSESSOR'S PARCEL MAP NUMBER 162-21-802-004

PARCEL III

THE WEST 100 FEET OF THE FOLLOWING DESCRIBED PROPERTY:

COMMENCING AT THE SOUTHEAST CORNER OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA. AS SHOWN IN FILE 2, PAGE 90 OF REGISTERED PROFESSIONAL ENGINEER'S FILE, CLARK COUNTY, NEVADA RECORDER'S OFFICE;

THENCE SOUTH 89°58'10" WEST ALONG THE SOUTH LINE OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, A DISTANCE OF 1344.27 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH 89°58'10" WEST A DISTANCE OF 243.14 FEET TO A POINT; THENCE NORTH 0°18'45" WEST A DISTANCE OF 39.41 FEET TO A POINT; THENCE NORTH 89°58'10" EAST A DISTANCE OF 243.14 FEET TO A POINT; THENCE SOUTH 0°18'45" EAST A DISTANCE OF 39.41 FEET TO THE TRUE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-703-001

PARCEL IV

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M., DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID NORTH HALF (N ½);
THENCE SOUTH 89°58'10" WEST 995.91 FEET TO THE SOUTHEAST CORNER OF THAT CERTAIN SUBDIVISION, RECORDED AS INSTRUMENT NO. 226882, SEPTEMBER 29, 1972 AS MONTEREY GRAND MANOR, BOOK 15 OF PLATS, PAGE 7, CLARK COUNTY, NEVADA RECORDS; THENCE SOUTH 89°58'10" WEST ALONG THE SOUTH LINE OF SAID SUBDIVISION A DISTANCE OF 105.22 FEET TO THE TRUE POINT OF BEGINNING; THENCE NORTH 0°08'45" WEST A DISTANCE OF 39.64 FEET; THENCE NORTH 89°58'10" WEST A DISTANCE OF 243.14 FEET; THENCE SOUTH 0°08'45" EAST A DISTANCE OF 0.23 FEET; THENCE SOUTH 89°58'10" WEST A DISTANCE OF 143 FEET MORE OR LESS TO A POINT ON AN EXTENSION LINE NORTHERLY OF THE EAST LINE OF THAT CERTAIN PARCEL CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE, AUGUST 11, 1953 AS INSTRUMENT NO. 411261, CLARK COUNTY RECORDS; THENCE SOUTHERLY ALONG SAID EXTENSION LINE A DISTANCE OF 39 FEET MORE OR LESS TO THE NORTHEAST CORNER OF SAID JANSEN'S PROPERTY; THENCE NORTH 89°58'10" EAST A DISTANCE OF 386 FEET MORE OR LESS TO THE TRUE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-703-002

REMAINING PARCEL AFTER THE TAKE

PARCEL I

THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M.

SAVINGS AND EXCEPTING THEREFROM THE WEST 660 FEET THEREOF, AND THE EAST 265 FEET THEREOF.

FURTHER SAVING AND EXCEPTING THEREFROM ANY PORTION THEREOF LYING WITH TROPICANA AVENUE AS CONVEYED TO THE STATE OF NEVADA BY DEED RECORDED MAY 16, 1965 AS DOCUMENT NO. 1609955 OF OFFICIAL RECORDS.

FURTHER SAVING AND EXCEPTING THEREFROM AN EASEMENT FOR RIGHT-OF-WAY, OVER AND ACROSS A TWENTY (20) FOOT STRIP OF LAND TOGETHER WITH RIGHTS INCIDENTAL THERETO, AS RESERVED IN THE DEED, RECORDED AUGUST 11, 1953 IN BOOK 71 OF DEEDS, PAGE 350, AS DOCUMENT NO. 411261, OF OFFICIAL RECORDS.

FURTHER EXCEPTING THEREFROM COMMENCING AT THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21; THENCE N 00°16'36" W A DISTANCE OF 43.79 FEET TO A POINT ON THE NORTH RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100.00 FEET WIDE) SAID POINT ALSO BEING THE POINT OF BEGINNING; THENCE CONTINUING N 00°16'36"

W, 67.78 FEET; THENCE N 89°40'47" E, 19.47 FEET, THENCE N 00°51'00" W, 16.17 FEET; THENCE N 89°09'00" E, 16.46 FEET; THENCE S 43°01'30" E, 59.81 FEET; THENCE S 88°01'30" EAST, 150.00 FEET; THENCE CURVING TO THE RIGHT ALONG A 257.00 FOOT RADIUS CURVE, CONCAVE SOUTHWESTERLY, THROUGH A CENTRAL ANGLE OF 12°34'14", AN ARC LENGTH OF 56.39 FEET TO A POINT OF REVERSE CURVATURE A RADIAL LINE TO SAID CURVE BEARS N 14°32'44" E; THENCE CURVING TO THE LEFT ALONG A 243.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 12°43'10", AN ARC LENGTH OF 53.95 FEET TO A POINT OF COMPOUND CURVATURE A RADIAL LINE TO SAID POINT BEARS S 01°49'34" W; THENCE CURVING TO THE LEFT ALONG A 4,530.66 FOOT RADIUS CURVE, CONCAVE NORTHERLY, THROUGH A CENTRAL ANGLE OF 00°44'33", AN ARC LENGTH OF 58.71 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 01°05'01" W; THENCE 00°11'23" E, 12.32 FEET TO A POINT ON THE AFOREMENTIONED NORTH RIGHT-OF-WAY LINE OF TROPICANA AVENUE; THENCE S 89°09'00" W ALONG SAID NORTH RIGHT-OF-WAY LINE, 393.83 FEET TO THE POINT OF BEGINNING.

FURTHER SUBJECT TO THE FOLLOWING DESCRIBED DRAINAGE EASEMENT COMMENCING AT THE SOUTHEAST CORNER OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF SAID SECTION 21; THENCE S 89°50'06" W ALONG THE SOUTH LINE OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, 263.36 FEET; THENCE N 00°11'23" W, 48.50 FEET TO A POINT ON THE NORTH

RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100.00 FEET WIDE), CONTINUING N 00°11'23" W, 12.32 FEET TO THE POINT OF BEGINNING; THENCE NORTH 00°11'23" W, 11.68 FEET; THENCE S 89°09'00" W, 115.21 FEET TO A POINT OF NON-TANGENCY ON A CURVE; THENCE FROM A TANGENT WHICH BEARS S 76°12'08" E, CURVING TO THE RIGHT ALONG THE ARC OF A 257.00 FOOT RADIUS CURVE CONCAVE SOUTHWESTERLY, THROUGH A CENTRAL ANGLE OF 00°44'52", AN ARC LENGTH OF 3.35 FEET TO A POINT OF REVERSE CURVATURE,

A RADIAL LINE TO SAID CURVE BEARS N 14°32'44" E, THENCE CURVING TO THE LEFT ALONG THE ARC OF A 243.00 FOOT RADIUS CURVE, CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 12°43'10", AN ARC LENGTH OF 53.94 FEET TO A POINT OF COMPOUND CURVATURE, A RADIAL LINE TO SAID POINT BEARS S 01°49'34" W, THENCE CURVING TO THE LEFT ALONG THE ARC OF 4,530.66 FOOT RADIUS CURVE, CONCAVE NORTHERLY, THROUGH A CENTRAL ANGLE OF 0°44'33", AN ARC LENGTH OF 58.71 FEET TO THE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-802-002

PARCEL II

THE WEST 100 FEET OF THE EAST 265 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M.

ASSESSORS'S PARCEL NUMBER 162-21-802-003

EXCEPTING THEREFROM ANY PORTION OF SAID LAND LYING BETWEEN THE LEFT OF NORTHERLY

FIFTY (50) FOOT RIGHT-OF-WAY LINE, MEASURED AT RIGHT ANGLES TO THE CENTERLINE OF FAC-806 (BOND ROAD) AND THE SOUTH BOUNDARY OF SAID SOUTH 200 FEET OF THE WEST 100 FEET OF THE EAST 265 FEET OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, SAID CENTERLINE PERTINENT TO BUT NOT LIMITED TO THE ABOVE MENTIONED LAND, SAID CENTERLINE MORE FULLY DESCRIBED AS FOLLOWS: BEGINNING AT THE INTERSECTION OF THE WESTERLY BOUNDARY OF THE NORTHWEST QUARTER (NW ¼) OF THE NORTHEAST QUARTER (NE ¼) OF SECTION 28, TOWNSHIP 21 SOUTH, RANGE 61 EAST M.D.B. & M., WITH THE CENTERLINE OF FAS-806 (BOND ROAD) AT OR NEAR HIGHWAY ENGINEER'S STATION "03" 26+37.92 P.O.T. WHICH POINT BEARS S 0°18'31" E A DISTANCE OF 2.89 FEET FROM THE QUARTER SECTION CORNER COMMON TO SECTION 21 AND 28, THENCE S 89°01'51" E A DISTANCE OF 362.32 FEET TO HIGHWAY ENGINEER'S STATION "03" 30+00.24 ANGLE POINT LEFT; THENCE N 89°01'15" E A DISTANCE OF 2,273.30 FEET TO HIGHWAY ENGINEER'S STATION "03" 52+72.54 P.O.T. WHICH POINT BEARS N 0°07'12" E A DISTANCE OF 17.39 FEET FROM THE SOUTHEAST SECTION CORNER OF 21, AS CONVEYED TO THE STATE OF NEVADA FOR HIGHWAY AND INCIDENTAL PURPOSES BY DEED RECORDED AUGUST 18, 1959 AS DOCUMENT NO. 170714 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

FURTHER EXCEPTING THEREFROM COMMENCING AT THE SOUTHEAST CORNER OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE

¼) OF SAID SECTION 21; THENCE S 89°50'06" W ALONG THE SOUTH LINE THEREOF A DISTANCE OF 163.34 FEET; THENCE N 00°11'23" W A DISTANCE OF 49.70 FEET TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100' R/W) ALSO BEING THE POINT OF BEGINNING; THENCE S 89°09'00" W ALONG SAID NORTH RIGHT-OF-WAY LINE, 99.99 FEET; THENCE N 00°11'23" W, 12.32 FEET TO A POINT TO WHICH A RADIAL LINE BEARS S 01°05'02" W, THENCE CURVING TO THE LEFT ALONG A 4,530.66 FOOT RADIUS CURVE, CONCAVE NORTHERLY THROUGH A CENTRAL ANGLE OF 00°47'32", AN ARC LENGTH OF 62.65 FEET TO A POINT OF NON-TANGENCY TO WHICH A RADIAL LINE BEARS S 00°17'29" W; THENCE N 44°09'00" E, 15.70 FEET; THENCE N 00°02'20" W, 25.68 FEET; THENCE N 89°49'48" E, 26.32 FEET; THENCE S 00°11'23" E, 47.11 FEET TO THE POINT OF BEGINNING.

FURTHER SUBJECT TO THE FOLLOWING DESCRIBED DRAINAGE EASEMENT COMMENCING AT THE SOUTHEAST CORNER OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21; THENCE S 89°50'06" W ALONG THE SOUTH LINE OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, 163.34 FEET; THENCE N 00°11'23" W, 49.70 FEET TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF TROPICANA AVENUE (100.00 FEET WIDE); THENCE S 89°09'00" WEST ALONG SAID NORTH RIGHT-OF-WAY LINE, 100.00 FEET; THENCE N 00°11'23" W, 12.32 FEET TO THE POINT OF BEGINNING; THENCE FROM A TANGENT WHICH BEARS S 88°54'58" E, CURVING TO THE LEFT

ALONG THE ARC OF A 4,530.66 FOOT RADIUS CURVE CONCAVE NORTHERLY THROUGH A CENTRAL ANGLE OF 00°47'32", AN ARC LENGTH OF 62.64 FEET TO A POINT OF NON-TANGENCY TO WHICH A RADIAL LINE BEARS S 00°17'30" W; THENCE N 44°09'00" E, 15.70 FEET; THENCE N 00°02'20" W, 2.26 FEET; THENCE S 89°09'00" W, 73.62 FEET; THENCE S 00°11'23" E, 11.68 FEET TO THE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-802-004

PARCEL III

THE WEST 100 FEET OF THE FOLLOWING DESCRIBED PROPERTY:

COMMENCING AT THE SOUTHEAST CORNER OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA, AS SHOWN IN FILE 2, PAGE 90 OF REGISTERED PROFESSIONAL ENGINEER'S FILE, CLARK COUNTY, NEVADA RECORDER'S OFFICE;

THENCE SOUTH 89°58'10" WEST ALONG THE SOUTH LINE OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 21, A DISTANCE OF 1344.27 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH 89°58' 10" WEST A DISTANCE OF 243.14 FEET TO A POINT; THENCE NORTH 0°18'45" WEST A DISTANCE OF 39.41 FEET TO A POINT; THENCE NORTH 89°58'10" EAST A DISTANCE OF 243.14 FEET TO A POINT; THENCE SOUTH 0°18'45" EAST A DISTANCE OF 39.41 FEET TO THE TRUE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-703-001

PARCEL IV

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 21, TOWNSHIP 21 SOUTH, RANGE 61 EAST, M.D.B. & M., DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID NORTH HALF (N ½);
THENCE SOUTH 89°58'10" WEST 995.91 FEET TO THE SOUTHEAST CORNER OF THAT CERTAIN SUBDIVISION, RECORDED AS INSTRUMENT NO. 226882, SEPTEMBER 29, 1972 AS MONTEREY GRAND MANOR, BOOK 15 OF PLATS, PAGE 7, CLARK COUNTY, NEVADA RECORDS; THENCE SOUTH 89°58'10" WEST ALONG THE SOUTH LINE OF SAID SUBDIVISION A DISTANCE OF 105.22 FEET TO THE TRUE POINT OF BEGINNING; THENCE NORTH 0°08'45" WEST A DISTANCE OF 39.64 FEET; THENCE NORTH 89°58'10" WEST A DISTANCE OF 243.14 FEET; THENCE SOUTH 0°08'45" EAST A DISTANCE OF 0.23 FEET; THENCE SOUTH 89°58'10" WEST A DISTANCE OF 143 FEET MORE OR LESS TO A POINT ON AN EXTENSION LINE NORTHERLY OF THE EAST LINE OF THAT CERTAIN PARCEL CONVEYED TO EDWARD J. JANSEN AND TRUMAN B. HINKLE, AUGUST 11, 1953 AS INSTRUMENT NO. 411261, CLARK COUNTY RECORDS; THENCE SOUTHERLY ALONG SAID EXTENSION LINE A DISTANCE OF 39 FEET MORE OR LESS TO THE NORTHEAST CORNER OF SAID JANSEN'S PROPERTY; THENCE NORTH 89°58'10" EAST A DISTANCE OF 386 FEET MORE OR LESS TO THE TRUE POINT OF BEGINNING.

ASSESSOR'S PARCEL NUMBER 162-21-703-002

2. That at the time of Plaintiff's acts complained of herein, Defendants were the owner in fee simple of the subject real property described above.

3. That Plaintiff's Amended Complaint on file herein fails to fully set forth the extent of the taking of Defendant's property or the damages to the remainder of Defendant's property not taken, and fails to describe fully the Defendant's remaining property.

4. That the larger parcel, out of which Plaintiff's Amended Complaint alleges a partial taking, contains 38.188 acres and is described above as the original parcel before the take.

5. That, in addition to the taking and damages described in Plaintiff's Complaint, Plaintiff damaged Defendant's property by imposing building height restrictions by Clark County Ordinances No. 728 and 1221 for the purpose of protecting the vertical and horizontal glide slope for Runway 19R: Plaintiff enacted a building height restriction which imposed an avigation easement (hereinafter "avigation easement") across Defendant's property in 1981 and enacted a subsequent height restriction which imposed a second avigation easement across and above Defendant's property in 1990. Defendants were not aware of the taking of these avigation easements until they recently observed heavy construction equipment being used to extend Runway 19R at McCarran International Airport and when, upon further investigation, they learned on October 13 and 14, 1995, that these avigation easements will grossly limit the building height on the subject property.

6. That the taking of said avigation easements over Defendant" property directly and proximately causes Defendant's property to be damaged by a continual increase in dust, fumes, smoke, noise and vibrations by operation of McCarran Airport. According to Plaintiff's own personnel and public pronouncements, the noise levels over Defendant's property will increase in excess of 200% of the current noise levels as a result of the widening and extension of Runway 19R. The extension and widening of Runway 19R will substantially increase the noise, dust, fumes, smoke and vibration damage over and upon Defendant's property as described above to an unbearable and uninhabitable condition. As a result of Plaintiff's plan and construction, the extension and widening of Runway 19R will accommodate much larger aircraft and will place aircraft departing and landing substantially closer and lower to Defendant's property. Plaintiff believes and alleges that this will create a situation that will constructively evict the existing trailer home tenants, forcing them to have to be be relocated.

7. That the height restrictions over the subject property in the after condition is as low as 30 feet. As such, Plaintiff has restricted the highest and best use of Defendant's property for development by limiting the buildable height to such an extent that the after condition value of the subject property is substantially impaired from its before condition value. See attached Air Space Zoning Chart, Exhibit A. Defendant's property had a highest and best use in the before condition for hotel/casino development. However, in the after condition, with the implementation of the height restrictions and the noise, dust fumes, smoke and vibrations as a result of the widening and extending by an additional 5,000 feet of Runway 19R at

McCarran International Airport, defendant can no longer utilize its property in its highest and best use capacity as it was entitled to before Plaintiff took its property.

8. Defendants are not obligated to exhaust its administrative remedies by seeking a variance in the height restriction because the ordinance provides no variance will be given. Therefore, such an attempt at exhaustion of administrative remedies would be futile.

9. Defendants complain and alleges that Plaintiff CLARK COUNTY, acting through its McCarran International Airport, has taken and damaged Defendant's entire parcel. The Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Nevada Constitution require payment of just compensation to Defendant for both the taking of a part of Defendant's property and the damage to the remainder of Defendant's property described above by the taking of avigation easements.

10. Under the doctrine of collateral estoppel, Defendants must make this Counterclaim in this action in order not to have its claim barred in any subsequent action, as Defendant has now become aware of this claim. Since Clark County is the Plaintiff in this action for the taking of Defendant's property to widen Tropicana Avenue, and Clark County is the owner and operator of McCarran International Airport and is responsible for the taking of the avigation easements over Defendant's property, Defendant is obligated to bring all claims against the Plaintiff in this action.

WHEREFORE, Defendants pray that a judgment be entered in this matter awarding just compensation to Defendants according to proof for the taking and damaging of Defendants' property, for allowable litigation costs and

expenses, and for such other relief as this Court deems just and proper in the premises.

Defendants further pray that, in the event Defendants are liable in anyway for the relocation expenses of the trailer home tenants due to Plaintiff's taking of Defendants' property, Plaintiff be ordered to pay these relocation expenses.

DATED this 14 day of October, 1997.

/s/ James J. Leavitt for
KERMITT L. WATERS
Nevada Bar#2571
438 E. Sahara Avenue
Las Vegas, Nevada 89104
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that I am an employee of Kermitt L. Waters, and that on the 14th day of October, 1997, I deposited for mailing in Las Vegas, Nevada, a true and correct copy of the foregoing document addressed to:

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Deputy District Attorney
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/s/
An Employee of
Kermitt L. Waters

Supreme Court, U.S.
FILED
APR 23 2005
OFFICE OF THE CLERK

NO. 04-1282

In The Supreme Court Of The United States

TIEN FU HSU, et al.,

Petitioners,

vs.

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of the State of Nevada

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

I THE 5TH AMENDMENT DETERMINES A TAKING BY WHAT A STATE DOES, NOT BY WHAT IT SAYS 1

II THIS CASE INVOLVES A PHYSICAL TAKING OF PROPERTY FOR PUBLIC USE BECAUSE CLARK COUNTY'S ACTIONS WERE AVOWEDLY DESIGNED TO ALLOW AIRCRAFT TO INTRUDE INTO PRIVATE PROPERTY AS PART OF THEIR OPERATIONS AT THE COUNTY'S AIRPORT 4

III AS USEFUL AS THIS COURT'S *PENN CENTRAL* DECISION MAY BE IN OTHER CIRCUMSTANCES, IT HAS NOTHING TO DO WITH THIS CASE 5

IV THE STATE COURTS ARE IN HOPELESS CONFLICT ON APPLYING THE 5TH AMENDMENT IN CASES LIKE THIS 7

V THE COUNTY'S BRIEF DEMONSTRATES THE NEED FOR A REVIEW OF AIRPORT LAW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Beach v. Ocwen Federal Bank,
523 U.S. 410 (1998) 8

Davis v. Newton Coal Co.,
267 U.S. 292 (1925) 1

Dolan v. City of Tigard,
512 U.S. 374 (1994) 4

Griggs v. Allegheny County,
369 U.S. 84 (1962) 9, 10

Hughes v. Washington,
389 U.S. 290 (1967) 1

Kaiser-Aetna v. United States,
444 U.S. 164 (1979) 4

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 4, 7

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 3, 7

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 3

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) 5, 6, 7, 8

Sneed v. County of Riverside,
32 Cal. Rptr. 318 (Cal. App. 1963). 5

TABLE OF AUTHORITIES
(continued)

Page

United States v. Causby,
328 U.S. 256 (1946)) 5, 9, 10

Williamson County Reg. Plan. Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 6

TEXTS

Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?*
55 Land Use Law & Zoning Digest,
no. 9, at p. 4 (Sept. 2003) 2

I

THE 5TH AMENDMENT DETERMINES A TAKING BY WHAT A STATE *DOES*, NOT BY WHAT IT *SAYS*

The County urges that there can be no taking of property because the ordinance it drafted to benefit its own airport does not explicitly order the use of the Petitioners' property by overflying aircraft. This approach totally ignores the County's own evidence as well as the law

First, eighty years ago, this Court concluded that the words crafted by government do not determine the legality of its actions – the determinative matter is the effect of the actions themselves: "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].) More recently, the rule was summarized this way: ". . . the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967][Stewart, J., concurring].)

Second, the County wholly disregards what it *did* through its ordinance, ignoring in the process the undisputed evidence produced below – including evidence given by its own witnesses – showing that the effect of the ordinance was to allow the use of the subject property for physical intrusion (in the pilots' sole discretion) by aircraft using the County-owned McCarran International Airport. Thus, William Dunlay, the County's aviation expert testified (as quoted by the Nevada Supreme Court):

> "Q. And the reason that's done is because planes may on occasion need to go into that area for aeronautical operations. Correct?

"A. Yes. That's my understanding, just to provide some maneuvering room down close to the runway.

"Q. For airplanes to go into if they need to; correct?

"A. Yes." (Pet. App., p. 13.)

Third, that evidence led the trial court to summarize that it was "undisputed . . . that the reason for the height limitations on this property is [so the property] . . . can be used by airplanes . . . . [A]irport personnel . . . are clear that the space is necessary and that it is used." (Pet. App., p. 53.)

Fourth, the evidence was also clear to the County's legal consultant, a well-known land use academic who – after trial – published an article about the case in a nationally distributed planning journal, noting that the airspace immediately above the Petitioners' property had been "set aside for possible use by incoming and outgoing aircraft. . . . The purpose of the Transition Zone is to allow aircraft the temporary use of airspace above privately owned property." (Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?* 55 Land Use Law & Zoning Digest, no. 9, at p. 4 [Sept. 2003].)[1]

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[1] The County's response to this *factual* summary is that Professor Laitos agrees with the County's *legal* position. (Br. in Opp., p. 18, n. 11.) That is hardly shocking (after all, Professor Laitos concededly worked with the County to develop its legal theory). However, the fact that the County had no comment on the professor's accurate recounting of the trespassory facts speaks volumes for the bankruptcy of the County's argument here, because the undisputed facts *do*

There is thus no legitimate dispute about the effect of the County's actions: they were designed to allow pilots to enter the Petitioners' airspace at their whim. That is the taking of an easement and requires compensation.[2]

The County's insistence that this Court look only at the words of its ordinance would not merely elevate form over substance, but would give Constitutional primacy to cleverness and imagination.[3] To accept the County's position would put a premium on hiring inventive draftspersons (rather than legal experts) for, as the Court put it in another 5th Amendment takings opinion, the only way for the government to lose (if wording were the test) would be to hire a "stupid staff." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025, n. 12 [1992].)

The cleverness *vel non* of the County's staff cannot be the line that divides the Constitutional from the void.

---

show the County's successful effort to make the Petitioners' property available for physical use for the benefit of the public.

[2] Seeking to minimize the economic impact of what it did to the Petitioners, the County downplays the value of this property by saying that it is half a mile from the Las Vegas Strip. (Br. in Opp., p. 2.) That's pretty close; it is one quarter of the length of Washington, D.C.'s National Mall.

[3] This Court has condemned "cleverness and imagination" as a substitute for Constitutional compliance. (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 [1987].)

II

THIS CASE INVOLVES A PHYSICAL TAKING OF PROPERTY FOR PUBLIC USE BECAUSE CLARK COUNTY'S ACTIONS WERE AVOWEDLY DESIGNED TO ALLOW AIRCRAFT TO INTRUDE INTO PRIVATE PROPERTY AS PART OF THEIR OPERATIONS AT THE COUNTY'S AIRPORT

The County is not pleased with the obvious impact of this Court's physical invasion cases on its actions. (Br. in Opp., pp. 23-24.)

Nonetheless, this Court made it clear in the series of decisions including *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), discussed in the Petition at pp. 17-18, that government action effectuating the entry of members of the general public onto private property – to use as though the property were publicly owned – is a 5th Amendment taking that cannot be done without just compensation.

In *none* of these cases did the government itself invade private property. In *all* of them, the regulations enabled third parties to trespass at will, just as in this case.

Repeatedly calling the regulation "traditional," "ordinary," or "common" (see Br. in Opp., pp. i, ii, 1, 8, 9, 15 [twice], 16, 17, 19, 20 [twice], 25 and 26) cannot alchemize this physical occupation of private property into a regulatory silk purse. Its effect, as plainly shown by the evidence – including the County's own expert witness – and the post-trial commentary of its own expert legal consultant, was to subject this property to physical public use by low

flying aircraft in the pilots' sole discretion, thus substantially impacting private use of the land's surface – just as this Court predicted in *United States v. Causby*, 328 U.S. 256, 262 (1946) (quoted *post*, p. 9).

The difference between "traditional" height restriction ordinances and height restrictions designed to allow public use for flight was clearly explained by a California Court:

> "We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and the zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone." (*Sneed v. County of Riverside*, 32 Cal. Rptr. 318, 320 [Cal. App. 1963].)

Just so.

III

AS USEFUL AS THIS COURT'S *PENN CENTRAL* DECISION MAY BE IN OTHER CIRCUMSTANCES, IT HAS NOTHING TO DO WITH THIS CASE

The Nevada Supreme Court accepted the County's invitation to evade the effect of this Court's physical taking cases and held that the way to determine whether a taking occurred here is to subject the matter to the *ad hoc*, multi-factor analysis outlined by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which requires "ripening" through the administrative process of application for (and denial of) land use permits under

Williamson County Reg. Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).[4]

Clark County now urges this Court to magnify that error by approving it.

The fundamental problem is that *Penn Central* did not involve a physical taking, and thus has nothing to do with this Petition.[5]

Penn Central, as explained in the Petition, pp. 14-15, was not a physical taking case. It had nothing to do with governmental regulations enabling anyone to trespass on private property and use it at will. *Penn Central* was a pure aesthetic regulation case, one in which a government agency limited the use that an owner could make of private property, but did *not* authorize members of the public to make actual physical use of the property.

Penn Central involved regulation of the height of a proposed building to preserve the historical ambience of the Grand Central Terminal. Nothing in either the language or effect of New York City's ordinance subjected the property to actual public use. That is why, as the County accurately notes (Br. in Opp., pp. 16-17) no servitude was found in that case. Limiting building height is one thing; enabling actual public use of private airspace is markedly – and Constitutionally – different. There was no use by the public in *Penn Central*, which is why it does not apply here.

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[4] A different aspect of *Williamson County* was argued in *Lingle v. Chevron U.S.A., Inc.*, No. 04-163.

[5] That is why, contrary to the County's alarum (Br. in Opp., p. 8), a decision in the Petitioners' favor would have no impact on *Penn Central*.

For the same reason, this ordinance is not (as the County argues) equivalent to a building "set back" ordinance that requires space to be left unused between a building and the street. (See Br. in Opp., p. 4.) Nothing in a set back ordinance authorizes or allows public entry on, or use of, private land.

It is the actual use of private property by the general public that separates physical from regulatory takings. When there is a physical taking, liability is *per se*, or "categorical." (*Loretto*, 458 U.S. at 427; *Lucas*, 505 U.S. at 1015.) The government must then compensate the owners regardless of the uses that may remain,[6] in contrast to regulatory taking cases, in which *Penn Central* mandates an *ad hoc* examination of the impact of government action on the owner's property rights as a whole.

IV

THE STATE COURTS ARE IN HOPELESS CONFLICT ON APPLYING THE 5TH AMENDMENT IN CASES LIKE THIS

State courts disagree on the precise issue raised here: when ostensible building height restrictions are imposed to enable the flying public to use the overlying, low level airspace, does the 5th Amendment require compensation?

The decisions reaching conflicting legal conclusions are collected in the Petition, at pp. 9-11 (requiring compensation), and pp. 11-12 (refusing compensation).

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[6] In this Court's words, when there is a physical taking, government's obligation to compensate "does not depend on whether the volume of space it occupies is bigger than a breadbox." (*Loretto*, 458 U.S. at 438, n. 16.)

Amazingly, the County insists there is no conflict, although it was not able to convince even the Nevada Supreme Court of that proposition. (See Pet. App., p. 36, n. 88 [where that court collected contrary cases in a "but see" footnote]). What the County really means is that it doesn't care for the cases which disagree with its point of view. But that doesn't make the conflict either "fabricated" (Br. in Opp., p. 10) or non-existent (Br. in Opp., p. 9). Rather, it emphasizes the need for this Court's intervention.

That some of the opinions are older does not make them "outdated" (Br. in Opp., p. 12). Instead, they reflect settled law in those jurisdictions that has not been challenged because it is sensible and accepted.[7]

Nor were any of the conflicting cases falling on the County's side of the decisional divide affected by this Court's *Penn Central* decision, as the County asserts (Br. in Opp., p. 11). Not one of those cases even mentions *Penn Central*, much less uses its analysis to distinguish the contrary decisions in other jurisdictions.

Whether the County likes it or not, there *is* clear conflict among the state courts on this fundamental 5th Amendment issue. This Court needs to resolve it.

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[7] The County's attempt to brush off some of the cases because they were decisions of intermediate appellate courts fails on two grounds. First, this Court has reviewed decisions of state supreme courts in part because of conflicts with intermediate appellate courts in other states. (E.g., *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 414-415, n. 5 [1998].) Second, the unquestioned longevity of those decisions shows that they *do* represent the settled law in those states.

V

THE COUNTY'S BRIEF DEMONSTRATES THE NEED FOR A REVIEW OF AIRPORT LAW

The Nevada Supreme Court narrowly read *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), as applying essentially to noise cases. The County's brief would relegate physical takings like this to review under regulatory taking standards. (Br. in Opp., p. 26.)

Although more than half a century old, *Causby* made clear that low level aircraft flights severely diminish the utility of the subjacent land, even though "enjoyment and use of the land are not *completely* destroyed." (*Causby*, 328 U.S. at 262; emphasis added.) That fits harmoniously with this Court's more recent physical taking cases which mandate compensation for the taking of any interest, regardless of the nature of the diminished use remaining to the property owner. (See *ante*, p. 7, n. 6.)

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would *limit* the utility of the land and cause a *diminution* in its value." (*Causby*, 328 U.S. at 262; emphasis added.)

Griggs echoed the same thought and placed on the airport operator the responsibility for acquiring all property interests needed to provide safe airport approaches. (369 U.S. at 89-90.) There is nothing "incongruous" (Br. in Opp., p. 19) about these Petitioners asking this Court to apply that precept to them. The point of this regulation is to

allow aircraft using the County's airport to operate safely. The County's felt need to create "maneuvering room [for pilots] down close to the runway" (Pet. App., p. 13) is a de facto concession that this taking is physical.

Causby and *Griggs* were decided in an era of noisy, propeller-driven aircraft, and focused on the nuisance aspects of aircraft flight. This Court needs to relate its later decisions on physical takings to the jet-age airport context. A physical taking of *any* interest requires just compensation to satisfy the 5th Amendment.

CONCLUSION

Petitioners pray that Certiorari be granted.

Respectfully submitted,

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MOTION FILED
APR 2 5 2005

(2)

No. 04-1282

In the

Supreme Court of the United States

TIEN FU HSU, et al.,

Petitioners,

v.

COUNTY OF CLARK,
a political subdivision of the State of Nevada,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TIEN FU HSU, ET AL.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), Pacific Legal Foundation moves to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. Consent has been received from Petitioners and that consent has been lodged with this Court. Respondents, however, have withheld consent thus necessitating the filing of this motion.

INTEREST OF AMICUS CURIAE AND REASONS FOR GRANTING THIS MOTION[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 32 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

In the present case, Pacific Legal Foundation is particularly interested in providing additional reasons why this Court should accept the petition for writ of certiorari in this case in order to resolve the conflict in the state and lower federal courts over the question of airport-related takings of private property through height limitations. In particular, the attached amicus curiae brief will explain that when a governmental airport authority prohibits the private use of useable and buildable airspace above a parcel of private property for the purpose of facilitating incursions by jet airplanes, then the airport has physically invaded that airspace for its own entrepreneurial purposes. While a number of state courts have held that compensation must be paid in these circumstances, other courts, such as the Nevada Supreme Court, have found there to be no physical invasion unless there is also nuisance-like activity. The accompanying brief amicus curiae suggests that this is a serious conflict that should be resolved by this Court.

For these reasons, Pacific Legal Foundation respectfully requests permission to file the attached brief amicus curiae.

DATED: April, 2005.

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QUESTION PRESENTED

Clark County, Nevada, as owner and operator of the commercial jet airport serving Las Vegas, enacted laws that require property owners adjacent to its airport to set aside large amounts of valuable airspace (the kind of property used by others in the vicinity for the construction of major high rise hotels) to accommodate airport operations and to permit the occasional physical use of the airspace by pilots who need a bit more maneuvering room on approach or departure than the county had purchased to provide for that purpose.

The question presented is:

When government action requires owners of private property to allow aircraft to enter their airspace on an ad hoc basis so that the airspace must be set aside for the operation of an airport and the incursion by jet aircraft, has the government physically taken property requiring just compensation under the 5th Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY AND INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 4

I. WHERE LANDOWNERS MUST SUBMIT TO THE ENTRY OF UNINVITED STRANGERS UPON THEIR PROPERTY AND THE CONCOMITANT INTERFERENCE WITH THE USE OF THE PROPERTY, THE OWNERS' DOMINION INTERESTS HAVE BEEN SERIOUSLY COMPROMISED 4

II. THIS COURT CAN RESOLVE THE CONFLICTS IN THE STATE AND LOWER FEDERAL COURTS BY GRANTING THE PETITION FOR WRIT OF CERTIORARI AND ADDRESSING THE REASONS FOR APPLYING THE DOCTRINE OF PHYSICAL INVASIONS TO AIRSPACE INCURSIONS 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) 2

County of Clark v. Hsu, No. 38853 (Nev. Sept. 30, 2004) 8-9

Indiana Toll Road Commission v. Jankovich, 193 N.E.2d 237 (Ind. 1963) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 7

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6

McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) 9

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 2

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 6

Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964) . . 8-9

Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (Ct. App. 1963) 9

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 1

TABLE OF AUTHORITIES—Continued

Page

United States v. Causby, 328 U.S. 256 (1946) 3, 5

Wilson v. Layne, 526 U.S. 603 (1999) 4-5

Rules

Sup. Ct. R. 37.2(a) 1

R. 37.6 1

Miscellaneous

1 Coke, *Institutes* (19th ed. 1832) 5

2 Blackstone, William, *Commentaries on the Laws of England* (1765-1769) 4-5

3 Kent, *Commentaries* (Gould ed. 1896) 5

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 32 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.[1]

SUMMARY AND INTRODUCTION

The Petition for Writ of Certiorari in this case raises the important and unsettled question of whether the episodic invasion of airspace above Petitioners' property, an invasion that led to a 35 foot height limitation, constitutes a physical invasion taking for which compensation is owed. There is some confusion and disagreement in the state courts over the

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[1] Pursuant to this Court's Rule 37.2(a), Petitioners consented to the filing of this brief and a letter of consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

proper demarcation between physical invasions—which always implicate the Takings Clause—and allegations of regulatory takings—which more often than not require a weighing of relevant factors to determine whether relief is available under the Takings Clause of the United States Constitution.[2] The Nevada Supreme Court in this case downplayed the significance of the requirement that Petitioners suffer the uninvited intrusion of their airspace by commercial jet aircraft. Rather, the court focused its attention on the 35 foot height restriction, finding that it led to the unproven potential of a regulatory taking and nothing more.

The Nevada Supreme Court's decision to abjure a physical invasion analysis in favor of a *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), balancing test might be appropriate if the County were not using Petitioners' property for its own entrepreneurial reasons—namely the use of Petitioners' airspace for the flight path of straying jet airplanes. Indeed, the airport could no more operate without this airspace than it could operate without a runway and control tower. In other words, the particular airspace that lies above Petitioners' property is part and parcel of the airport and is set aside for the sole purpose of accommodating airport operations. For that reason, this case does *not* resemble the typical height limitation associated with a zoning ordinance. The animating reason for *this* height restriction is not derived from the typical zoning ordinance concerns of aesthetics, density, or infrastructure limitations. In light of the other massive buildings only a short distance from Petitioners' property, aesthetics, and density concerns could not be, and were not alleged to be, the rationale for the height restrictions here. Rather, the height limitation's

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[2] The Takings Clause of the United States Constitution is made applicable to the states through the Fourteenth Amendment. *See, e.g., Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

sole purpose was to accommodate those jet airplanes that may stray into Petitioners' airspace.

The court below, however, took its cue from those physical invasion cases that arose from nuisance-like physical invasions of airspace such as *United States v. Causby*, 328 U.S. 256 (1946). While the noise and problems associated with low-flying aircraft may have helped distill this Court's reasoning in *Causby*, since that case there has been a host of physical invasion cases from this and other courts where the *sine qua non* of a physical invasion has much less to do with nuisance than with the simple fact that a landowner's property has been *physically* invaded—with or without any accompanying noise, nuisance, or even serious inconvenience.

Yet, the trend persists in many state courts that for there to be an aviation-induced physical invasion of airspace, there must also be nuisance-like activities. Other courts, however, have properly focused not on the extent of any nuisance-like injuries caused by the physical invasion but instead on the nature of the uninvited invasion of a landowner's airspace by third parties. As will be shown below, it is appropriate for this Court to grant the Petition for Writ of Certiorari in order to resolve this question.

REASONS FOR GRANTING THE PETITION

I

WHERE LANDOWNERS MUST SUBMIT TO THE ENTRY OF UNINVITED STRANGERS UPON THEIR PROPERTY AND THE CONCOMITANT INTERFERENCE WITH THE USE OF THE PROPERTY, THE OWNERS' DOMINION INTERESTS HAVE BEEN SERIOUSLY COMPROMISED

There are important reasons why most courts traditionally have been very solicitous to landowners who are seeking to keep strangers at bay and off of their private property. At the heart of property jurisprudence is the principle that landowners have a fundamental right to control the dominion of their land. Indeed, the idea that land becomes the dominion of its owner, and a place where the power of outside society and the government can be limited, animates much of the early common-law writing on property. As William Blackstone put it:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 William Blackstone, *Commentaries on the Laws of England* *2 (1765-1769).

As noted often by this Court, in English law, a man's home is his castle:

> In1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against

injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In his Commentaries on the Laws of England, William Blackstone noted that

> "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).

Wilson v. Layne, 526 U.S. 603, 609-10 (1999).

While the common law of property has necessarily evolved since the days when Lord Coke declared that property is owned from the center of the earth to the center of the universe,[3] the fundamental concept that an owner has the right to exclude the world from his property has remained.

The question that continues to vex the courts such as the Nevada Supreme Court, however, is when does an intrusion upon the airspace above an owner's land constitute an invasion of these fundamental principles of dominion? Certainly, no one today seriously entertains the notion that a flight at 30,000 feet affects in any meaningful way the rights of a landowner. And few people dispute that a constant intrusion by multiple jet airplanes at a few dozen feet constitutes an actionable invasion

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[3] "Cujus est solum ejus est usque ad coelum." 1 Coke, *Institutes*, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, *Commentaries*, Lewis Ed. 1902, p. 18; 3 Kent, *Commentaries*, Gould Ed. 1896, p. 621. As cited in *United States v. Causby*, 328 U.S. at 260-61, 261 n.5.

of the owner's right to exclude as well as the right to the quiet enjoyment of the property. But it is the intersection of the right to exclude with the ownership of the *useable* airspace that is implicated in cases such as the present one.

When this question is viewed in the context of an owner's dominion over his property, one must look further at the meaning of dominion. In the context of land ownership, dominion encompasses an owner's right to control the users and the use of the property—the power to control the borders of the property as well as the uses to which the property may be put. A case that involves an interference with *both* of these elements is more likely to constitute a prohibited interference with the owner's dominion interests than a situation where only one element is implicated. Thus, a typical regulation that limits the height and size of a building is not necessarily a prohibited invasion of dominion interests so long as the owner may continue to exclude the public.[4] And a regulatory action that requires a landowner to suffer limited third party incursions is less likely to interfere with dominion interests than a regulation that at the same time also interferes with the *use* of property. An example would be the involuntary acceptance of petition-gatherers in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where the primary use of the property as a shopping mall was not burdened. But a governmental action that affects *both* the right to exclude third parties *and* adversely impacts the owner's ability to use his property is far more likely to unduly interfere with his dominion interests—especially when an important use by the landowner is taken in order to accommodate a use by the government.

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[4] Of course, the greater the interference with the use of a property, even without the invasion by third parties, the greater the implications are for dominion interests. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Thus, in *Causby* there was both the incursion by airplanes and destruction of the use of the property as a chicken farm, leading to this Court's finding that there was a physical invasion. Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), there was both a physical incursion by the public and the conversion of the use of the canal as a private waterway into a public waterway. And *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), involved both an unwanted incursion by third parties and the inability to use a small portion of the owner's apartment building for exclusively private purposes.

In the present case, both elements of the owners' dominion interests are adversely affected. The obvious preferred and highest and best use of the property would be to build a resort hotel of similar size and stature as many of the others within a very short distance of this property. But because the owners are required to acquiesce to incursions by large jet airplanes they are unable to put their property to the desired use. Instead, the airspace is being used for airport operations and the owners' dominion interests have been implicated.

While some courts reach results that are in accord with the preservation of an owner's dominion interests, the court below, like a number of other courts, focused only on whether the incursions also caused nuisance-like effects. Absent such effects, it found no physical invasion. An analysis of the conflict in the state and lower federal courts that exists on the question of the takings implications of airspace incursions reveals that the reasoning of these courts is often seriously lacking in an understanding of the nature of the fundamental property interests that are impacted in these cases. This is a misunderstanding and conflict that only this Court can effectively resolve.

II

THIS COURT CAN RESOLVE THE CONFLICTS IN THE STATE AND LOWER FEDERAL COURTS BY GRANTING THE PETITION FOR WRIT OF CERTIORARI AND ADDRESSING THE REASONS FOR APPLYING THE DOCTRINE OF PHYSICAL INVASIONS TO AIRSPACE INCURSIONS

Petitioners, as well as the Court below, point out the existence of a conflict in the state and lower federal courts. *See County of Clark v. Hsu*, No. 38853, slip op. at 36 n.88 (Nev. Sept. 30, 2004), and Petition for Writ of Certiorari at 8-12.

Many of the courts that have ruled that landowners are entitled to compensation when airports impose height restrictions speak in terms of the taking of the *useable* airspace. Thus, the Indiana Supreme Court notes that "a landowner is also the owner of the air space above his property, *at least to the extent that such air space may reasonably be used by him.*" *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237, 239 (Ind. 1963) (emphasis added). The court rightly distinguished the case from those of ordinary height limitations or setbacks, noting that here the defendant sought "to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation." *Id.* at 241. This taking of the "use" of the airspace clearly implicates the concerns of dominion that were absent from the decision of the Nevada Supreme Court.

Likewise, the Idaho Supreme Court held that "a landowner has a property right in the reasonable use of the airspace above his land which cannot be 'taken' for public use without just compensation." *Roark v. City of Caldwell*, 394 P.2d 641, 645 (Idaho 1964). Because the airport-related height restrictions caused a substantial loss in value, and because property consists

of "'the unrestricted right of use, enjoyment and disposal'" the court found a taking. *Id.* at 646 (citation omitted).

In *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), after noting that when height restrictions facilitate the actual use of the airspace there is an invasion or trespass, the Minnesota Supreme Court held:

> [T]hat where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.

Id. at 258-59.

The Minnesota court relied upon a California Court of Appeal decision which contains a cogent understanding of the nature of airport-related height restrictions:

> We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

Sneed v. County of Riverside, 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318, 320 (Ct. App. 1963). This *contemplation of actual use* clearly implicates the loss of dominion experienced by the affected landowner.

It is the understanding of the implications of the actual use of airspace that is lacking in the decision of the Nevada Supreme Court and those other state courts that it cites in its decision. *See* slip op. at 37 n.89. By forcing the landowners here to acquiesce to jet airplanes flying into the space where the

owners seek to construct a building, the landowners have suffered a physical invasion that is no less serious than the invasion in *Loretto* or *Kaiser Aetna*. While not all the state court decisions finding for the landowners in these cases speak in terms of "physical invasion," there is the common understanding that the loss of *use* caused by the accommodation for airplane incursions results in a taking because the owner's ability to use fully the property and keep outsiders away is lost.

Finally, the height restrictions found in these various state airport zoning cases are not ordinary zoning provisions in two important respects. First, these restrictions make the physical invasion feasible by clearing the developable airspace for airplanes. Second, these height restrictions precisely identify the portion of the property that is subject to the invasion. The court below, and others like it, however, seem to think that despite the use of the buildable airspace by third party airports and jet airplanes there can be no physical invasion unless it is accompanied by nuisance-like consequences. The better rule, however, is one that recognizes that there can be a physical invasion *without* collateral nuisance-like damages. By accepting review in this case, this Court can harmonize these various and conflicting state court decisions in a way that fully recognizes the loss of dominion experienced by landowners who cannot utilize their airspace because of the forced acceptance of airport operations and jet airplane overflights.

CONCLUSION

The petition for writ of certiorari should be ***granted***.

DATED: April, 2005.

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